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THE LAW
OF
TRUSTS AND TRUSTEES,
AS ADMINISTERED IN
ENGLAND AND AMERICA,
EMBRACING
THE COMMON LAW,

TOGETHER WITH

The Statute Laws of the several States of the Union, and the
decisions of the Courts thereon.

BY JOEL TIFFANY AND E. F. BULLARD,
COUNSELLORS AT LAW.

"Nullum iniquum in jure præsumendum est."

"Legal precedents ought not despotically to govern, but discreetly to guide."

ALBANY:
W. C. LITTLE, LAW BOOKSELLER,
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TO

THE AMERICAN BAR.

FOR YOU, GENTLEMEN, THIS WORK HAS BEEN PREPARED, BY YOU IT IS TO BE TRIED
AND JUDGED, AND BY YOUR JUDGMENT IT MUST ABIDE; THERE-
FORE TO YOU IT IS RESPECTFULLY

DEDICATED

BY

THE AUTHORS.

PREFACE.

A work on the Law of Trusts, suited to the American Bar, must necessarily be one of great labor. It ought to embrace the law on that subject as established in Thirty-four sovereign States, each State having so altered and modified the common law doctrine as seemed best adapted to their circumstances. These statutory changes in the several States have made necessary corresponding changes or modifications of the common law doctrine of trusts, which appear in the decisions of their courts. These decisions, becoming precedents, tend to mislead the American student, and will do so, unless he becomes acquainted with the statutory provisions upon which they are based. It therefore became necessary to present the common law doctrine of trusts, the modification of the same by the statutes of the several States, and the decisions of the courts of these States on questions arising out of these modifications. This has been done as extensively as the limits of this work would permit. It is hoped that it may prove acceptable to the profession, and be an aid to them in their study of the Law of Trusts, as administered in England and America.

ALBANY, *June*, 1862.

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INTRODUCTORY.

OF THE NATURE OF TRUSTS AND THE GENERAL PRINCIPLES
APPLICABLE THERETO.

A TRUST, in its most enlarged sense, implies the equitable interest, right or title which one may have in property, real or personal, distinct from the legal ownership.¹ In contemplation of law, the legal owner has direct dominion over the property, while the beneficial interest therein belongs to another. The legal owner is denominated trustee. The beneficial owner, the *cestui que trust* or *beneficiary*. The legal estate in the hands of the trustee is made to subserve certain uses for the benefit of others, and these uses, etc., constitute the trust.¹

To create a trust there must be four things: 1. A subject matter; 2. A person competent to create it; 3. One capable of holding as trustee; and, lastly, one for whose benefit the trust is held.²

The subject matter of a trust may be property of every description; as well all choses in action, all

¹ Story's Equity, sec. 964.

² Hill on Trustees, 44; Story's Eq., sec. 1040 (b), 1055, 1057; Varick v. Edwards, 1 Hoff. Ch., 382; Hinkle v. Wanzer, 17 How. U. S., 353; Vogle v. Hughes, 2 Sm. & Giff., 18.

possibilities of trusts, contingent interests, expectancies, as that which can be legally transferred.¹

Any person may create a trust who is capable of making a valid disposition of property of any description; because in the act of disposing of his property he has the power of attaching such declarations, limitations and restrictions to the act of disposition, as will convey the legal estate to one, and the beneficial interest in part or the whole to another, causing him who holds the legal estate to become the trustee of the one to whom the beneficial interest is conveyed. But the trust will be valid only to the extent of the legal capacity of the one conveying it.

But a trust implies a trustee; for it is a well settled principle in equity, that a trust once properly created shall never fail for want of a trustee. It is a rule in equity to which there is no exception, that a court of equity never wants a trustee. Therefore if a trust has been properly created and no trustee has been appointed, or having been appointed, is incompetent, or has refused to accept, or has died, the trust shall not fail on that account; but the court will pursue the property, and decree the person in whom the legal estate is vested to execute the trust, unless he be a bona fide purchaser for a valuable consideration without notice of the trust, or otherwise entitled to protection.² It is

¹ Hill on Trustees, 44; Story's Eq., sec. 1040 (b), 1055, 1057; Varick v. Edwards, 1 Hoff. Ch., 382; Hinkle v. Wanzer, 17 How. U. S., 353; Vogle v. Hughes, 2 Sm. & Giff., 18.

² Hill on Trustees, 48; Story's Eq., sec. 976; Mad. Ch. R., 365, 580; Piatt v. Vattier, 9 Peters' R., 405; 2 Fonb. Eq., 142, n.

seldom that a trust is declared without the contemporaneous appointment of a trustee. It sometimes happens, however, that the individual appointed will not or cannot serve. He may be incapacitated from holding the legal estate and consequently cannot serve as trustee. For as the trustee is to have dominion over the legal estate he must be an individual in whom the legal estate can vest.¹

But a trust also implies a beneficiary, or a *cestui que trust*, some one for whose benefit the trust has been created. These objects of trust may be individuals, or they may be those whose existence is not recognized at law. It is not necessary to the creation of a trust estate that the *cestui que trust* should be named or even be in being at the time.² In general, any person who is capable of taking an interest in property at law, may, to the extent of his legal capacity, and no further, become entitled to such trust in equity.²

A trust is now merely what a use was before the *Statute of Uses*. It is an interest resting in conscience and equity, and when declared legally, charges the conscience of the donee in trust, and Chancery applies the same rules thereto as formerly were applied to uses.³

Uses at common law might be created in two ways. 1. By the declared intent of the parties upon the transmutation of possession; and, 2. By

¹ See post, Who may be a Trustee, div. II., chap. I.

² *Ashhurst v. Given*, 5 W. & S., 329; *Trotter v. Blocker*, 6 Porter, 269; *Frazier v. Frazier*, 2 Hill Ch., 305.

³ *Fisher v. Fields*, 10 J. R., 506; *Johnson v. Fleet*, 14 Wend., 180.

an agreement upon an effectual consideration without transmutation of possession.¹ Uses which passed by transmutation of possession were raised by a feoffment, fine or recovery, or lease or release. Those raised without the transmutation of possession, were raised either by bargain and sale enrolled in consideration of money, or by way of covenant to stand seised in consideration of blood.²

Formerly there has been much question whether at common law uses of lands would be raised by parol, or even by writing not under seal. In the case of *Dean v. Dean*, 6 Conn., 287, it was denied that trusts in land could be created by parol; but in *Flemming v. Donahoe*, 5 Ohio, 250, the contrary doctrine was affirmed. Lord Chief Baron Gilbert in his treatise on uses, extracted a principle from those decisions which seemed conflicting, which looked very far toward harmonizing them. The principle is this: At common law a use might have been raised by words upon a conveyance that *passed the possession by some solemn act*, as feoffment. But where there was no such act, there it seems a deed declaratory of the use was necessary: for as a feoffment might be made at common law by parol, so might the uses be declared by parol. But where a deed was necessary for passing the estate itself, it was also requisite for the declaration of the use;³ and as trusts succeeded to uses, therefore, in the

¹ Story's Eq., sec. 973, 793, 987, 1040; Willard's Eq., 412; Gilbert on Uses, 75, 82; 2 Fonbl. Eq., B. 2, chap. 2, sec. 1, and notes.

² Story's Eq., sec. 971.

³ Gilbert on Uses, 270, 271.

absence of any statute upon that subject, it may be taken as the general law, that a valid trust either of real or personal estate may be created by parol declaration, wherever at law a deed is not requisite for passing the estate or property itself.

But the common law method of creating trusts of realty by parol has been somewhat modified by the statute of 29 Car. II.¹ It is denominated the Statute of Frauds, &c. The seventh section of the third chapter of that act declares, "that all declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else shall be void." The eighth section of the same act exempts from the operation of the act trusts arising or resulting by implication or construction of law. Under the construction given to this act by the Judges it has been decided that a trust of land may still be effectually created by parol, and that the statute will be satisfied if the existence of the trust is manifested and proved by written evidence.²

There was also another statute denominated the Statute of Uses, of the 27 Henry VIII, ch. 10, which was passed to remedy certain mischiefs which

¹ Story's Eq., sec. 972; 2 Black. Com., 337.

² Forster v. Hale, 3 Ves., 707; S. C. 5 Ves., 308; Randall v. Morgan, 12 Ves., 74; Church v. Sterling, 16 Conn., 388; Johnson v. Ronald, 4 Mumf., 77; Moran v. Hays, 1 J. C. R., 339; Jackson v. Moor, 6 Cowan, 706; Flagg v. Mann, 2 Sumner, 406; Story's Eq., sec. 972; 4 Kent's Com., 305; Leman v. Whitley, 4 Russell, 423; Fisher v. Fields, 10 Johns. Rep.; 495.

had arisen from a perversion of the system of uses. Says Lord Bacon in his Abridgment, under the title of Uses and Trusts, Part I, “by this course of putting lands into use, there were many inconveniences; as the practice which originated in a reasonable cause, was turned to deceive many of their just rights, as namely, the man that had cause to sue for his own land knew not against whom to bring his action, nor who was the owner of it; the wife was defrauded of her thirds; the husband of being tenant by the curtesy; the lord was defrauded of his wardship, relief, heriot and escheat; the creditor of the extent of his debt; the poor tenant of his lease, for the rights and duties were given by the law from him that was owner of the land, and none other, which was now the feoffee in trust, and so the old owner, which we call the feoffor, should take the profits and leave his power to dispose of the land at his discretion to the feoffee.” Many efforts were made from time to time to remedy these difficulties by statutory enactments, when at length the statute of 27 Henry VIII was enacted, substantially as follows: “That when any person should be seised of lands, &c., to the use, confidence or trust of any other person or body politic, the person or corporation entitled to the use in fee simple, fee tail, for life or for years, or otherwise, should thenceforth stand or be seised or possessed of the lands, &c., of and in the like estate as they have in the use, trust or confidence; and that the estate of the person so seised to uses shall be deemed to be in him or them that have the use, in such quality,

manner, form or condition as they had before in the use." Under the operation of this statute, many uses were thus transferred into possession, and became legal estates, and were thenceforth governed by the doctrines of the courts of law.¹

It was not the design of this statute to defeat the equitable interest of the *cestui que trust*, but to change it into a legal estate; if, therefore, that cannot be done, the courts will still protect the interest of the beneficiary, and treat the trust as still subsisting, unless the statute positively forbids it.²

Mr. Justice Willard in his Equity Jurisprudence, page 411, remarks, "that it was probably the object of this act to abolish uses altogether, but the construction put upon it by the Judges at an early day, in a manner defeated that intent. Thus, in the limitation of an estate to A and his heirs, to the use of B and his heirs, in trust for D, it was held that B's estate was executed, and that D took nothing.³ The statute was held to be satisfied by executing the first use. Courts of equity took hold of this construction, and said that the intention must be supported. It is plain that B was not intended to take. His conscience was affected. To this the reason of mankind assented, and it has stood on this footing ever since. Thus a statute made upon great consideration, introduced in a solemn and

¹ Fonb. Eq., B. 2, chap. 1, sec. 3; Willard's Eq., 411.

² Vander Volgen v. Yates, 3 Barb. Ch., 243; Ref. Dutch Church v. Veeder, 4 Wend., 494.

³ 1 Mad. Ch., 567, 36 Henry VIII, Tyrell's case, Dy. 155, A; 2 Black. Com., 336, also see note 59; 4 Kent's Com., 302.

pompous manner, by this construction has had no other effect than to add, at most, three words to a conveyance.¹ The second use in these cases, though void under the statute, was treated by courts of equity as a *trust*, and they enforced it as such.² The remedy was in equity alone, and courts of law took no notice of it. This was the origin of trusts as they have been administered since the Statute of Uses.”

This statute was designed to operate upon real estate only. But in respect to realty, there are three methods by which direct trusts in lands are created, notwithstanding the statute. The first method has already been alluded to in the limitation of a use upon a use; the second, where a copyhold or leasehold estate is limited by deed or will to a person upon trust or use; and third, where the donee to uses has certain trusts or uses to perform which require that he should have the legal estate.³

Statutes substantially re-enacting these provisions of the 27 Henry VIII and 29 Car. II, are in existence in many of the States, and will be thoroughly examined in another part of this work devoted to the consideration of that subject. In general, these statutes operate only upon simple or *passive* trusts in lands, and do not extend to those special trusts where some active duty is imposed upon the trustee;

¹ 2 Black. Com., 336; Vaughn, 50; Atk., 591.

² 1 Mad. Ch., 567, 36 Henry VIII, Tyrell's case, Dy. 155, A; 2 Black. Com., 336, also see note 59; 4 Kent's Com., 302.

³ Bac. Us., 355; 2 Black. Com., 336; 1 Cruise's Dig., tit. 12, chap. 1, sec. 4-36; Vander Volgen v. Yates, 3 Barb. Ch., 243.

neither do these statutes affect the power of disposing of chattels personal.¹

In concluding this introductory chapter, attention is called to the distinction suggested by Lord Chief Baron Gilbert, between the *raising or creating* a use of lands originally by *verbal declaration*, and the admission of parol averments to *prove or sustain it* after it has been raised. This distinction must not be neglected in considering the principle how far uses affecting lands may be raised by parol.

¹ Story's Eq., sec. 972, 793, 987, 1040; 2 Fonbl. Eq., B. 2, chap. 2, sec. 4, and note x; Nab v. Nab, 10 Mod., 404; Fordyce v. Willis, 2 Bro. Ch. R., 586; 2 Black. Com., 337.

DIVISION I.

OF THE SEVERAL KINDS OF TRUSTS.¹

CHAPTER I.

EXPRESS TRUSTS.

SECTION I. EXPRESS TRUSTS IN WRITING.

1. Express trusts are created whenever the legal estate in property of any description is conveyed to one competent to take as trustee, to be held for the benefit of one capable of taking as *cestui que trust*. Hence, any instrument in writing, making a legal disposition of property, which contains a direction or makes a declaration that the party holding the same, shall do it for the benefit of another, charges the conscience of the donee and compels the legal estate to subserve certain uses and benefits in favor of the beneficiary.

Since the statute of 29 Car. II, chap. 3, sec. 7, which has been generally adopted in the United States, all creations or declarations of trusts of

¹ Executory devises, contingent or springing uses, resulting uses, shifting uses, &c., see 2 Black. Com., 334, 335.

land, tenements or hereditaments, must be manifested and proved by some writing signed by the party entitled to declare such trusts, or by his last will in writing.¹ It has been held, under the construction given to these statutes, that a trust affecting realty may be raised by parol notwithstanding the statute, provided the trust or confidence be *manifested and proved* by a writing sufficiently evincive of the trust, signed by the party entitled to declare it.² Nor is it necessary that the declaration of the trust should be contained in the instrument conveying the legal estate to the trustee; but it must be made in contemplation of it, or contemporaneously with it. For after the legal estate has passed from the donor or grantor, and vested in the trustee, the former has no further power or control over the estate: consequently, no subsequent instrument executed by him will operate to deprive the grantee of his right to the beneficial interest.³ The evidence by which the trust is proved may be subsequently manifested; but it always relates back to the time of the creation of the trust, and treats all intermediate acts of disposition made by the *cestui que trust* between the *creation* and *declaration* of the trust, as valid. Thus, if there be a gift by will, no subsequent instrument executed by the

¹ Story's Eq., sec. 972, also 793 (a).

² 2 Fonbl. Eq., B. 2, chap. 2, sec. 4, and note; Cook v. Broaking, 3 Vern., 106, 107; Inchiquin v. French, 1 Cox, 1; Smith v. Attersoll, 1 Russ. R., 266.

³ Hill on Trustees, 64; Adlington v. Cann, 3 Atk., 145, 151; Crabb v. Crabb, 1 M. & K., 511; Kilpin v. Kilpin, Id., 520, 532; Briggs v. Penny, 3 Macn. & Gord., 504.

devisor will raise a trust, unless the instrument operate as a revocation of the will.¹

Where an express trust is created by a written instrument there seldom can arise any question, whether the person taking the estate takes the beneficial interest, or takes merely as trustee for others. Questions of trust often arise in the construction of wills and written instruments, *inter vivos*; but these questions are those of implied or constructive trusts, rather than of express ones, and will be considered in their appropriate place.

SECTION II. EXPRESS TRUSTS BY PAROL.

Originally uses, being of a secret nature, were created by parol agreement between the feoffor to uses and the *cestui que use*: or by parol declaration.² There has been much dispute, however, upon the question, whether uses or trusts of realty could at common law be created by parol.³ But the weight of authority is, that where there is no statute to the contrary, trusts either of real or personal estate may be created by parol declaration. Especially is this the case where the estate in the property can be passed without deed. The rule laid down by Baron Gilbert in his "Treatise on Uses," is this: At common law a use may have been raised by word upon a conveyance that passed the possession by some solemn act, as feoffment. But where there

¹ 3 Atk., 152.

² Sand. Us., 210.

³ Dean v. Dean, 6 Conn., 287; Flemming v. Donahoe, 5 Ohio, 250.

was no such act, a deed declaratory of the use was necessary.

In considering the question how far trusts of realty can be created by parol, or proved by parol declaration, it is important to distinguish between the act creating the trust and the kind of evidence by which the trust is to be manifested and proved.¹ The Statute for the Prevention of Frauds (29 Car. II, chap. 3, sec. 7) did not prohibit the creation of trusts of realty by parol, but required that they should be "manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing." And such is the construction which has been put upon it.² An examination of the cases will show that courts of equity are intent upon carrying out the legal and equitable intention of the donor, deviser or grantor, to uses and trusts, where that intention can be clearly ascertained, whether the trust affecting realty is raised by written or parol declaration; and they will not be restrained in the execution of the trust any further than the positive prohibitions of the statute require.

It is said that no evidence can be admitted for the purpose of engrafting a parol trust upon an instrument which purports to be an absolute gift.³

¹ Hill on Trustees, 56.

² *Foster v. Hale*, 3 Ves., 707; S. C., 5 Ves., 308; *Randall v. Morgan*, 12 Ves., 74; Hill on Trustees, 56, see note and authorities there quoted; *Brown v. Lunt*, 37 Maine, 434.

³ *Irnham v. Child*, 1 Bro. C. C., 92; *Bartlett v. Pickersgill*, 1 Ed., 515; *Leman v. Whitley*, 4 Russ., 423.

But the objection is not to the creation of the trust by parol, but to the *manner* of proving it. Therefore if it can be legally made to appear that the donee took in trust, equity will enforce it.¹ So also, if the defendant admit a parol trust in his answer he may set up the Statute of Frauds as a defence; but if he does not do it by way of plea or answer, he will be deemed to have waived it, and the trust will be enforced.² Thus also where it is attempted to convert a *prima facie* absolute gift into a trust by means of a verbal declaration, if the declaration be made contemporaneously with and in contemplation of the act of disposition, and there be legal evidence of it, the trust will be enforced.³

But in order to fasten a trust on property by means of parol declaration, the expressions used must amount to a clear and explicit declaration of the trust. Casual or indefinite expressions are insufficient for such a purpose,⁴ and the expressions must point out with certainty both the subject matter of the trust and the person who is to take the beneficial interest.⁴

The legal effect of a parol trust is the same as one created by a more formal assurance. Thus a trust

¹ *Cripps v. Jee*, 4 Bro. C. C., 472; *Podmore v. Gunning*, 7 Sims., 644, 645; *Muckleston v. Brown*, 6 Ves., 52; *Strickland v. Aldridge*, 9 Ves., 516; *Hill on Trustees*, 61, and authorities cited.

² *Flagg v. Mann*, 2 Sumner, 528; *Ontario Bank v. Root*, 3 Paige, 478; *Wood v. Dillie*, 11 Ohio, 455; *Hill on Trustees*, 61, note 2, and authorities cited.

³ *Leman v. Whitley*, 4 Russ., 423.

⁴ *Harrison v. McMenomy*, 2 Edw. Ch., 251; *Slocum v. Marshall*, 2 Wash. C. C., 398; *Bayley v. Boulcott*, 4 Russ., 345; *Bendbow v. Townshend*, 1 M. & K., 506; *Kilpin v. Kilpin*, 1 M. & K., 520.

once created by parol, cannot subsequently be extinguished or in any manner changed by the party creating it.¹

Where a freeman of London purchased real estate in the name of another person, without any trust being expressed at the time, (consequently the declaration of trust was not found in the deed,) the freeman having devised the estate, died. Subsequent to his death, the trustee declared that he held the estate in trust for the freeman. This declaration was held good, so as to entitle the devisee in opposition to the widow, who claimed the estate by the custom of London.² But it must be observed that the declaration made by the trustee after the death of the freeman, did not create the trust, but only furnished evidence of its existence from the time the legal estate was thus conveyed to the trustee.

A lease was granted absolutely to a person who afterwards became a bankrupt. Subsequent to his bankruptcy, he made a declaration that the lease was granted to him as a trustee for another person. It was held that the assignees of the bankrupt were not entitled to the lease.³ Here, also, the declaration of the trust by the trustee only declared that which had been created at the time the lease was granted. Upon the same principle, a copyholder made an absolute surrender to A, and died. After his death, A admitted that the surrender was made

¹ *Kilpin v. Kilpin* 1 M. & K., 531, 539; *Kirkpatrick v. McDonald*, 11 Penn., 387.

² *Ambrose v. Ambrose*, 1 P. Wms., 322.

³ *Gardner v. Rowe*, 2 S. & St., 346; *S. C.* 5 Ross, 258.

to him in trust for the surrenderor, and after his death, for the purpose of his will. The devisees under the copyholder's will, and not his customary heirs, were held to be entitled.¹

As the seventh section of the statute of 29 Car. II applies only to "lands, tenements and hereditaments," therefore the law affecting chattels personal remains unaltered, and valid trusts of such property can be created and proved by parol.

There is another class of trusts, in the nature of express trusts, which may be created and proved by what is equivalent to parol declaration. Any expression signifying the intention that the donee of property is not to have the beneficial interest therein, will be binding on the conscience of the trustee, and will vest in him only the legal estate.² This class of trusts is created by certain fiduciary expressions, which equity considers sufficiently evincive of the trust, although the donee is not expressly directed to hold the property to certain uses, or in trust. Cases of this kind have usually arisen on the construction of gifts by will; sometimes, however, they arise in the construction of executory and informal instruments not of a testamentary nature, but the principles of construction are the same in either case.³ In the interpretation of the language of wills, courts of equity have gone great lengths by creating implied or constructive trusts

¹ *Wilson v. Dent*, 3 Sim., 385.

² *Morice v. Bishop of D.*, 10 Ves., 537.

³ *Countess of Lincoln v. D. of Newcastle*, 12 Ves., 227; *Blackburn v. Stables*, 2 V. & B., 369; *Jervois v. D. of Northumberland*, 1 J. & W., 574

from words of recommendation, precatory words, etc. Where the language of the testator clearly imports that the devisee is to hold for the benefit of another, and that other is clearly and unmistakably indicated, it will not matter what form of expression may be used to designate that intent. Thus, if a testator should, by his will, *desire* his executor to give to a particular person a certain sum of money, this would be construed into a legacy, although the will should leave to the option of the executor, how, when and in what manner it should be paid.¹ So, if a testator should desire his wife, at or before her death, to give certain personal estate among such of his relations as she should think most deserving and approve of, it would be held to be a legacy among such relations.² So where a gift in a will is expressed to be "*for the benefit*" of others;³ or to be at the disposal of the donee "*for*" herself and children,⁴ or "*towards*" her support and her family.³

In these and all similar cases, where the intention of the donor is unequivocally indicated to be that the donee shall take for the benefit of another, equity will declare the trust and see that it is faithfully executed. But in all cases of this kind,

¹ Story's Eq., sec. 1068; *Brest v. Offley*, 1 Ch. Rep., 246.

² Story's Eq., sec. 1068; *Harding v. Glynn*, 1 Atk., 469; *Malvin v. Kingsley*, 2 Ves. Jr., 333; *Brown v. Higgs*, 8 Ves., 570, 571.

³ *Jubber v. Jubber*, 9 Sim., 503; *Raikes v. Ward*, 1 Hare, 445.

⁴ *Woods v. Woods*, 1 M. & Cr., 401; *Crocket v. Crocket*, 1 Hare, 451. Where the words "*desire*," "*request*," "*entreat*," "*confidence*," "*hoping*," "*recommending*," will be sufficiently imperative to create a trust, see learned note to *Lawless v. Shaw*, Lloyd & Goold, 154; 4 Kent's Com., 305, note (a).

the fiduciary words must be imperative on the donee, and not give him discretionary power to do or not to do the thing indicated or desired; for if it is left to the discretion of the donee to apply or not to apply the gift, no trust will be created.¹

Trusts of this character will be considered more fully under the title of IMPLIED TRUSTS. They have been noticed here for the purpose of calling attention to the principle upon which they are declared to be trusts by courts of equity. He who has the legal and beneficial estate of property has the absolute dominion thereof, subject to the legal authority of the State. Therefore, in the disposition of his property, his will is absolute, and courts of equity, whenever they can ascertain that will, will see that it is complied with. Hence, any form of expression which clearly implies the creation of a trust estate, as the object or intent of the donor or grantor, will be sufficient to raise the trust. And the trust, though implied from the evidence, is in reality an EXPRESS TRUST, and will be treated as such by the court. That is, implied trusts are considered as really the expression of the will of the donor or grantor, as those which are denominated *Express Trusts*; the difference is only in the form of language by which the trust is expressed. They derive their authority from the will of the donor, grantor, &c., as gathered from his actions or expressions.

¹ *Morice v. Bishop of Durham*, 10 Ves., 536; *Ommaney v. Butcher*, T. & R., 270; *Gibbs v. Rumsey*, 2 V. & B., 297; *Ball v. Vardy*, 1 Ves. Jr., 270; *Thorp v. Owen*, 2 Hare, 607; *Heneage v. Lord Andover*, 10 Price, 230.

CHAPTER II.

IMPLIED TRUSTS.

SECTION I. RESULTING OR PRESUMPTIVE TRUSTS.

Implied trusts may be raised upon the supposed intention of the parties, as expressed by their language, conduct, or in the nature of the transaction. In all such cases the trust is *presumed* to be in accordance with the will of the donor, grantor or testator, and results as a just interpretation of the language, conduct and relation of the parties. Hence these trusts are called RESULTING OR PRESUMPTIVE TRUSTS.¹

There is another class of implied trusts which arises independently of any such intention, and is forced upon the conscience of the trustee by an equitable construction, or by the operation of law, as in cases of meditated fraud, imposition, notice of an adverse equity, and other cases of a similar nature. This class may be denominated CONSTRUCTIVE TRUSTS.²

Lord Nottingham³ classifies trusts, and states the general principles that regulate them, thus, "All are either *Express Trusts*, which are raised and

¹ Hill on Trustees, 91; 4 Kent's Com., 305.

² Story's Eq., sec. 1195; 4 Kent's Com., 305.

³ Cook v. Fountain, 3 Swanst. R., 585.

created by the act of the parties: or *Implied Trusts* which are raised and created by the act or construction of law. Again, express trusts are declared either by word or writing, and these declarations appear either by direct and manifest proof, or violent and necessary presumption. These last are commonly called *Presumptive Trusts*; and that is, when the court upon consideration of all circumstances, presumes there was a declaration either by word or writing, though the plain and direct proof thereof be not extant. In the present case there is no pretence of any proof that there was a trust declared, either by word or in writing; so the trust, if there be any, must either be implied by law or presumed by the court. There is one good, general and infallible rule that goes to both these kinds of trusts. It is such a general rule as never deceives; a general rule to which there is no exception; and that is this, the law never implies and the court never presumes a trust, but in case of absolute necessity. The reason of the rule is sacred; for if the Chancery do once take liberty to construe a trust by implication of law, or to presume a trust, unnecessarily, a way is open to the Lord Chancellor to construe or presume any man in England out of his estate."

Mr. Justice Story, in his *Equity Jurisprudence*, sec. 1195, thinks that this statement of the rule by Lord Nottingham is a little too strong. He thinks this to be a more correct exposition of the general rule, "A trust is never presumed or implied as intended by the parties unless, taking all the

circumstances together, that is the fair and reasonable interpretation of their acts and transactions.”

1. Implied trusts may be raised upon the supposed intention of the parties, as expressed by their language, conduct, or in the nature of the transaction.

Judge Lomax, in his copious and valuable Digest of the Laws respecting Real Property in the United States, considers the doctrine of implied trusts, in reference to the following cases, extracted from the numberless varieties of trusts.

1. Implied trusts arising out of the equitable conversion of land into money or money into land.

2. Where an estate is purchased in the name of one person, and the consideration is paid by another.

3. Where a conveyance is made of land without any consideration or declaration of the use.

4. Where a conveyance is made of land in trust declared as to a part, and the conveyance is silent as to the residue.

5. Where a conveyance of land is made upon such trust as shall be appointed, and there is a default of appointment.

6. Where an estate is conveyed on particular trusts which fail of taking effect.

7. Where a purchase is made by a trustee with trust money.¹

8. Where a purchase of real estate is made by partners with partnership funds.²

¹ See 4 Kent's Com., 307, note (c), for authorities.

² Phillips v. Crammond, 2 Wash. Cir. Rep., 441.

9. Where a renewal of release is obtained by a trustee or other person standing in some confidential relation.¹

10. Where purchases are made of outstanding claims upon an estate by trustees, or some of the tenants thereof, connected by privity of estate with others having an interest therein.

11. Where fraud has been committed in obtaining a conveyance.

12. Where a purchase has been made of land without a satisfaction of purchase money to the vendor.

13. Where a joint purchase has been made by several, and payments of the purchase money to the vendor have been made by some beyond their proportion.²

The Statute of Frauds (29 Car. II, chap. 3, secs. 7 & 8), which is generally the adopted law of this country, requires that trusts of lands, tenements and hereditaments shall be manifested and proved by some writing, signed by the party creating the trust. Under this statute it is held to be sufficient if the terms of the trust can be duly ascertained by the writing of the party. A letter acknowledging the trust will be sufficient to establish the existence of it. A trust of realty, therefore, need not be *created* by writing, but it must be *evidenced* by writing.³

But *resulting trusts* are expressly exempted from

¹ Holridge v. Gillespie, 2 Johns. Ch. R., 30; Davoue v. Fanning, Ib., 252.

² Lomax Dig., vol. I., 200; 4 Kent's Com., 306, note 1; Id., 308.

³ 4 Kent's Com., 305.

the operation of the statute; and there can be no question, that the facts and circumstances tending to establish the resulting trust may be proved by parol. Thus, where an estate is purchased in the name of A. and the consideration money is actually paid at the time by B., there is a resulting trust in favor of B., and the facts may be established, or the resulting trust may be rebutted by parol proof.¹ In the case of *Boyd v. McLean* it was held, after an examination of the cases, that a resulting trust might be established by parol proof, not only against the face of the deed itself, but in opposition to the answer of the nominal purchaser, denying the trust; and even after the death of such purchaser.²

1. UNEXHAUSTED RESIDUUM.

Resulting trusts arise where there are certain trusts created either by will or deed, which, when fully executed, leave an *unexhausted residuum*. Generally in such cases a resulting trust arises to the party creating the trust.³ This is not universally the case however. The intention of the grantor must be ascertained from the circumstances; and if it appear that he intended to part with the beneficial interest in the property absolutely, then such resulting trust may not arise. Thus where a father made a deed to his son, upon certain trusts for him-

¹ 4 Kent's Com., 306; *Willis v. Willis*, 2 Atk. Rep., 71; *Bartlett v. Pickersgill*, 1 Eden R., 515; *Boyd v. McLean*, 1 Johns. Ch. R., 582; *Bottsford v. Burr*, 2 Johns. Ch. R., 405; *Steere v. Steere*, 5 Johns. Ch. R., 1.

² See Art. No. 5 of Law Magazine No. 7.

³ Story's Eq., sec. 1196, and note (1); also 1199, and authorities (3).

self, his wife, and her children by him, after his decease, and no trust was declared of the surplus, it was held that there was no resulting trust to the father; and that the son took the surplus.¹ Lord Langdale remarked in the case of *Cook v. Hutchinson*, (*ut supra*,) that in general, where an estate or fund is given in trust for a particular purpose, the remainder, after that purpose is satisfied, will result to the grantor or heir of the grantor.² But that resulting trust may be rebutted even by parol evidence, and certainly cannot take effect where a contrary intention is to be collected from the whole instrument as indicated by the grantor. Lord Hardwich says,³ "Whether there is or is not, a resulting trust must depend upon the intention of the grantor." If any particular reasons occur why the grantor, or testator should intend a beneficial interest to the trustee, or devisee, there are no precedents to warrant the court to say that it shall not be a beneficial interest. Let us consider what were the intentions of the grantor in this deed. The father being upwards of eighty years of age executes a deed, which recites that he was desirous of settling the property to which he was entitled therein described, in such a manner as to make a provision

¹ *Cook v. Hutchinson*, 1 Keen, 42, 50.

² *Hobert v. Countess of Suffolk*, 2 Vern., 644; *Sherrard v. Lord Harborough*, Ambl., 165; *Wych v. Packington*, 3 B. P. C., 44; *Hill on Trustees*, 119, and authorities cited. See exceptions to this rule, *Hill on Trustees*, 120.

³ *Hill v. Bishop of London*, 1 Atk., 619. *King v. Denison*, 1 V. & B., 260, points out distinction applicable to these cases. *Fowler v. Garlike*, 1 Russ. & Mylne, 232.

for himself during his life, and for his wife and children after his death, and for such other purposes as were therein after expressed. He proceeds to make a release and assignment of the property to his son, "upon the trusts therein after declared concerning the same," and when he comes to declare the trusts he does not exhaust the whole of his property. I am of the opinion that this is immaterial; for considering the *relation* between the parties and the object and purport of the instrument, I have come to the conclusion that the father intended to part with all beneficial interest in the property, and that he meant his son to have the benefit of that part of the property of which the trusts are not expressly declared.¹

The principle in all these cases is, that the intention of the grantor, deviser, etc., shall prevail. *It is the intent which guides the use*, and where a party has expressly declared a particular estate of the use, the presumption is, that if he had intended to part with the residue he would have declared that intention also.¹ But where the grantee has paid a consideration which is named in the deed, although it be purely nominal, and no uses are declared, there will be no resulting trust to the grantor; because the payment, even of a nominal consideration, shows an intent, that the grantee should have some use; and no other being specified, he must take the whole use. But where a particular use is declared, there the residue of the use results

¹ Story's Eq., sec. 1199, and authorities (3).

to the grantor, for the presumption that he intended to part with the whole use is thereby repelled.¹

Of the same nature are those implied or resulting trusts which sometimes arise from the assignments of debtors for the benefit of their creditors. And these assignments may be for the purpose of paying debts generally, or for the payment of some particular debt. In the case of the *United States v. Hoyt*,² where a debtor made an assignment of his property in trust, to pay any judgment which the United States might recover against him and the sureties on his official bond as a collector of customs; and after the recovery of such judgment the plaintiffs in it filed a bill for an account by the trustees, and the application of the trust funds to the payment of the judgment; it was held that a trust in favor of the plaintiffs was created by the assignment by implication of law.

But resulting trusts which arise out of assignments in favor of creditors, are usually those which arise for the benefit of the assignor himself, as, where after fulfilling the express trust, a surplus remains in the hands of the assignee.³

Consistently with the principles involved in resulting trusts there may be cases apparently contradicting the last stated principle. In the case of *Hill v. Bishop of London* (*ut supra*) the whole

¹ Story's Eq., sec. 1199, and authorities (3).

² 1 Blatchford's C. C., 332.

³ Story's Eq., sec. 1196; Burrill on Assignments, 250; *Wilkes v. Ferris*, 5 Johns. 335; *Dubois v. Dubois*, 7 Alabama, 235.

estate was given to the son, and certain trusts were declared, which did not exhaust the estate. But from a consideration of the *relation* of the parties, that is, “*a good consideration*,” “*a consideration of blood*,” the court felt justified in declaring that the beneficial interest in the *residuum* passed to the trustee, because it was evident that the father intended to part with the entire estate. If then, for a “good consideration,” a trust in the residuum may be raised for the benefit of the trustee, there can be no valid reason why the like trust may not be raised where a “*valuable consideration*” is substituted for a “*good one*.”¹ But where there is neither a “good” or a valuable consideration, and a trust is declared only as to a part of the estate, there can be no question that the beneficial interest in the residuum will result to the grantor. The mere want of a valuable consideration will not of itself, and without any auxiliary circumstances, create a resulting trust, and convert a grantee into a trustee, because that would destroy the effect of every voluntary conveyance. There must be the absence of both a consideration and a declaration of the use.²

2. ESTATE PURCHASED BY ONE, CONSIDERATION PAID BY ANOTHER.

A resulting trust arises wherever an estate is purchased in the name of one person and the con-

¹ Hill on Trustees, 122; Pratt v. Slackden, 14 Ves., 193.

² Saunders on Uses, 227; 4 Kent's Com., 306.

sideration is paid by or comes from another.¹ This trust is presumed from the *nature* of the transaction, from the apparent equity of the case. The one paying the consideration is considered, in the absence of any declaration or circumstances to the contrary, as entitled to the beneficial interest; and consequently the grantee becomes trustee for such interest. This trust being presumed, any circumstances or declarations which evince a different intention of the parties will tend to rebut the presumption.

Implied trusts arising under this head are in strict analogy with the common law doctrine, that where a feoffment is made without consideration the use results to the feoffor.² Upon the same principle, if only a part of the purchase money be paid by a third party a resulting trust in his favor *pro tanto* will arise;³ or where there is a joint purchase, and one pays the consideration, a trust results for his benefit.⁴ Sir E. Sugden in his work on vendors and purchasers has taken a distinction in cases where two or more persons contract for the purchase of an estate, which is conveyed to both, but the money is paid by one only. In that

¹ 4 Kent's Com., 306; Hill on Trustees, 91; Willis v. Willis, 2 Atk., 71; Lloyd v. Spillet, 2 Atk., 150; Rider v. Kidder, 10 Ves., 360; Strimpfler v. Roberts, 18 Penn. St. R., 283; Hill on Trustees, 91, and authorities cited, note (1).

² Dyer v. Dyer, 2 Cox, 92; 2 Sugd. V. & P., 134, 9th ed; 2 Mad. Ch. Pr., 140.

³ 4 Kent's Com., 306.

⁴ Ryal v. Ryal, 1 Atk. Rep., 59; Amb., 413; Bartlet v. Pickersgill, 1 Eden, 515; Lane v. Dighton, Amb., 409; Wray v. Steel, 2 Ves. & Beam, 388; Story, J., 3 Mason Rep., 364; 4 Kent's Com., 306.

case, says the learned writer, the one who paid the money cannot call upon those who paid no part of it, to repay him their shares of the purchase money or to convey their shares of the estate to him; nor can it be construed into a resulting trust, as such a trust cannot arise at an after period;¹ perhaps the only remedy is by bill for contribution. The basis of the distinction is in the rule that "*the intent guides the use*;" and as the estate was purchased by both, and the conveyance was made to both, the presumed intent to raise a trust is rebutted. It is otherwise, however, where the consideration proceeds from two or more persons jointly and the conveyance of the legal estate is taken in the name of one of them only. Upon the same principle, a resulting trust will arise in favor of parties in proportion to the amounts of the consideration they have respectively contributed, although their names do not appear in the conveyance.²

This doctrine applies to purchases only. Therefore, where a person in actual possession of property makes a gift of it, or transfers the possession to another, as a general rule no presumptive or resulting trust will arise. This will be considered hereafter.³

¹ 2 Sugd. V. & P., 931, 9th ed.; see also *Brooks v. Fowle*, 14 N. H., 248; *Cook v. Bronaugh*, 8 Engl. Ark., 183.

² *Wray v. Steel*, 2 V. & B., 388; 2 Sugd. V. & P., 140, 9th ed; *Riddle v. Emerson*, 1 Vern., 108; *Palmer v. Young*, 1 Vern., 276; *Botsford v. Burr*, 2 J. C. R., 405; *Quackenbush v. Leonard*, 9 Paige Ch., 334; *Stewart v. Brown*, 2 S. & R., 461; *Bernard v. Bougard*, Harr. Ch., 130; *Hill on Trustees*, 92, 3d Am. ed., note (1), authorities.

³ *Jefferys v. Jefferys*, Cr. & Ph., 138.

To constitute a resulting trust in real estate it is necessary that the consideration money upon the purchase should have belonged to the *cestui que trust*, or that it should have been advanced by some other person as a loan to him, or that it should have been advanced as a gift to him, or for his benefit. It is a creature of equity, and must arise, if at all, at the time the conveyance is made. It cannot arise after the legal estate has passed to the grantee.¹ Parol proof of the payment of the money notwithstanding the denial in the trustee's answer, is admissible.²

The rule, that a resulting trust arises where an estate is purchased in the name of one and the consideration is paid by another, also applies to copyholds, as well as to other property.³ The rule that a trust arises for the benefit of him from whom the consideration proceeds in the purchase of property, is a mere presumption, in the absence of other proof, and does not apply to the case where a person takes a conveyance in trust and pays the consideration himself. Here the presumption is rebutted by the taking the estate in trust;⁴ for a presumptive trust cannot arise where there is an express one.

In the State of New York it is provided by statute⁵ that when a grant for a valuable consideration

¹ Rogers v. Murry, 3 Paige, 390; Botsford v. Burr, 1 J. Ch. R., 405; Willard Ch. Jurisp., 600.

² See Hill on Trustees, 95 (148), note 1.

³ Withers v. Withers, Ambl., 151.

⁴ Dennison v. Gochring, 7 Barr's Rep., 175.

⁵ Rev. St. 1859, vol. III., p. 15, sec. 51, 52, 53; 5 Barb., 51; 2 Barb. Ch., 582; 12 Barb., 653; 8 Paige, 222; 1 Smith, 475; 16 Barb., 376.

shall be made to one person and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as alienee in such conveyance, except as against the creditors, at the time, of the person paying the consideration; and that a trust shall result in favor of such creditors to the extent necessary to satisfy their just demands.¹ But the statute provides that when the alienee has taken the conveyance in his own name without the consent or knowledge of the person paying the consideration, or in violation of some trust, the provisions above named shall not apply.²

Provisions similar to these are made by statute in Michigan³ and Wisconsin.⁴

3. ESTATE PURCHASED BY FUNDS OR PROPERTY HELD IN A FIDUCIARY CAPACITY.

In accordance with the spirit of the foregoing rule, a resulting trust arises where a purchase is made by one in his own name, but with funds which are in his hands in a fiduciary capacity. Thus, where a trustee purchases an estate with trust moneys, or where a partner purchases with

¹ 12 Barb., 653; Johns. Cas., 153; 3 Johns. R., 216; 11 Id., 91; 14 Id., 463; 16 Id., 197; 1 Johns. Ch. Rep., 582; 2 Id., 405; 3 Paige, 487; 4 Id., 578; 18 Wend., 258; 4 Denio, 439; 3 Barb., 555; 10 Paige, 567; 1 Smith, 475.

² 17 Barb., 103; 16 Id., 376; 11 Id., 399.

³ Rev. St. 1846, chap. 63, sec. 4.

⁴ Rev. St. 1858, chap. 84, sec. 7, 8, 9.

partnership funds,¹ or where an agent, employed to purchase, buys for himself,² or the trustees of a corporation buy land with corporate funds, and take the conveyance in their own name,³ or an executor purchases with the avails of the testator's estate,⁴ or a committee invest funds of a lunatic in land,⁵ or a guardian invests the funds of his ward,⁶ or where the husband buys land with his wife's separate property, or with savings out of her separate estate.⁷ In all cases where trust moneys have been misemployed, or moneys placed in the hands of others in a fiduciary capacity, have been invested in property without the consent of the beneficiary, a trust results, unless the *cestui que trust* elects to take the money instead thereof.

The right to follow trust moneys will continue so long as the identity of the funds can be established. The identity does not consist in specie, that is, in the particular pieces of coin, but in the fund itself.⁸ But the right of pursuit will fail, where the means of ascertainment fails; as, when the trust property is converted into money and has passed away; or

¹ Phillips v. Cramond, 2 W. C. C. R., 441; Kirkpatrick v. McDonald, 1 Jones (Penn.) 393; Baldwin v. Johnson, Saxton, 441; Smith v. Ramsey, 1 Gilm., 373; Pugh v. Currie, 5 Alb., 446; Edgar v. Donnelly, 2 Mumf., 387; Martin v. Greer, 1 Geo. Doc., 109; Freeman v. Kelley, 1 Hoff. Ch., 90.

² Church v. Sterling, 16 Conn., 388.

³ Methodist Ch. v. Wood, 5 Hamm., 283.

⁴ Garrett v. Garrett, 1 Strobl. Eq., 96; Seaman v. Cook, 14 Illin., 501.

⁵ Reid v. Fitch, 11 Barb. S. C., 399.

⁶ Cuplinger v. Stokes, Meigs, 175.

⁷ Methodist Ch. v. Jaques, 1 J. C. R., 450, also see Hill on Trustees, 92, page and authorities.

⁸ U. S. v. Inhabitants of Waterborough, Davies, 154; Goeppe's Appeal, 15 Penn. St., 428.

has passed into a mass of property of the same description, and cannot be separated.¹ But if a trustee mingle trust funds with his own private funds, in the purchase of land, a resulting trust will arise: for according to the usual rule on the subject of confusion, it is his duty to establish how much of his money went to the purchase, or the *cestui que trust* will take the whole.²

Where there is no fiduciary relation, the mere use of another's money, as where one sells another's property wrongfully, and invests the proceeds in lands, raises no resulting trust.³ The principle upon which a trust arises as the result of investing funds held in a fiduciary capacity, is in accordance with the equitable maxim, that a person assuming a fiduciary relation toward another in regard to property, is bound to exercise, for the benefit of the *cestui que trust*, all the rights, powers, knowledge and advantage of every description, which he derives from that position, or acquires by means of it:⁴ and also is in accordance with another principle in equity; that no person can be permitted to purchase an interest in property, where he has a duty to perform, which is inconsistent with the character of a purchaser.⁴ The principle is well set forth by the judge in the case of *Michoud v. Girod*, 4

¹ Thompson's Appeal, 22 Penn. St., 16.

² *Seaman v. Cook*, 14 Illin., 505; *Russell v. Jackson*, 10 Hare, 209.

³ *Ensley v. Ballantine*, 4 Humph., 233; *Campbel v. Drake*, 4 Ired. Eq., 94; *Contra*, *Bank of Am. v. Pollock*, 4 Edw. Ch., 215.

⁴ *Torry v. Bank of Orleans*, 9 Paige, 663; *Hawley v. Cramer*, 4 Cowen, 736; *Van Epps v. Van Epps*, 9 Paige, 237, 241; *Willard's Eq.*, 605, and note 1, and authorities.

Howard, S. C., 503. "The general rule," said the judge, "stands upon the great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and its application more frequent, in the private relations in which the vendor and purchaser may stand toward each other. The disability to purchase is a consequence of that relation between them which imposes on the one a duty to protect the interests of the other, from the faithful discharge of which duty, his own personal interests may withdraw him. In this conflict of interest the law wisely interferes. It acts upon the possibility that, in some cases the sense of that duty may prevail over the motives to self-interest; but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence and supersede those of duty. It therefore prohibits a party from purchasing on his own account; that which his duty or trust requires him to sell on the account of another; and from purchasing, on the account of another, that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is a buyer or seller on his own account, are directly conflicting with those of the person on whose account he buys or sells."¹

¹ Wormley v. Wormley, 8 Wheat., 421; Prevost v. Gratz, 6 Wheat., 481; Will. Eq., 606.



Although it is against sound policy to permit trustees and those standing in a like relation to become purchasers of trust property, without the leave of the court, or the consent of those interested therein, yet their purchases are not void absolutely. The end is attained by making them voidable. In equity the *cestui que trust* has the option either to confirm the purchase, and hold the trustee to it; or he may have the sale set aside. But no one except the *cestui que trust*, or some one standing in his relation, can apply for relief.¹ This right to avoid the sale cannot be enforced against a *bona fide* purchaser for a valuable consideration without notice—*Jackson v. Walsh ut supra*. This only applies to contracts that are executed. If the bargain be not completed and the aid of the court be invoked in behalf of the agent or trustee to compel a specific performance of the agreement, and the *cestuis que trust* be parties, and object to a confirmation of the sale, a court of equity will not decree a performance.²

4. A VOLUNTARY CONVEYANCE WITHOUT A DECLARATION OF TRUST.

Where the legal estate in lands is conveyed to a stranger without any consideration, it is denominated a voluntary conveyance, from which, it was

¹ *Jackson v. Van Dolfson*, 5 J. R., 43, 48; *Jackson v. Walsh*, 14 J. R., 407; *Wilson v. Troup*, 2 Cowen, 195; *Hawley v. Cramer*, 4 Cowen, 719; *Davou v. Fanning*, 2 J. Ch. R., 252, et seq.; *Jennison v. Hapgood*, 7 Pick., 1.

² *Munroe v. Allaire*, 2 Cain. Cas. in Er., 182; *Davou v. Fanning*, 2 J. Ch. R., 252, 268.

formerly held, that a trust resulted to the original owner, in conformity with the old doctrine, that where a feoffment was made without consideration a use resulted to the feoffor.¹ This is stating the doctrine too strongly. For it has been the settled doctrine of the courts, that a voluntary conveyance of real or personal estate, if duly executed and acted upon, will be valid and binding upon the original owner, and subsequent volunteers, claiming under him.²

The title of a volunteer is never favored in a court of equity; and proper evidence will always be admitted to establish a trust against him, by showing that it was the intention of the parties that he should take as trustee for the grantor, and not for his own benefit. As against creditors, and *bona fide* purchasers without notice, the want of a good and meritorious consideration to a conveyance, is deemed evidence of fraud;³ but as between the parties and their personal representatives, it is valid.⁴ As a general rule, equity will not recognize the title of a volunteer unless it be completely executed; and therefore, if the grant be not formally and legally executed, or if, from its loss or destruction, or for any other reason, it becomes necessary for a volunteer to have recourse to equity to put him in pos-

¹ 1 Cruise's Dig., tit. 12, chap. 2, sec. 52.

² *Young v. Peachy*, 2 Atk., 256; *Clavering v. Clavering*, 2 Vern., 473; *Boughton v. Boughton*, 1 Atk., 265; *Cook v. Fountain*, 3 Sw., 590; see authority, Hill, 106.

³ Willard's Eq., 227.

⁴ *Jackson v. Garnsey*, 16 J. R., 189; *Jackson v. Caldwell*, 1 Cowen, 622.

session of the estate, the court will not interfere;¹ for it is a settled principle that a valuable consideration is requisite to put a court in motion.²

A voluntary conveyance does not always imply that the instrument is without *some* consideration. In equity, the statement of a mere nominal consideration would not be allowed to affect the construction or operation of a deed. And a good or meritorious consideration will have its influence in determining whether a resulting trust will arise to the grantor, or whether it shall be considered a voluntary conveyance.³

Where there is a voluntary conveyance, and there is no direct admission or declaration of the trust, the court will look into all the circumstances arising from the nature of the transaction; it will consider the conduct and relation of the parties, that their intention may be ascertained. If the deed is made *ex parte*, and not communicated to the donee,⁴ or if the grantor continue in possession of the property and exercise acts of ownership over it;⁵ if the grantee recognize the grantor as the owner,⁶ or acquiesce for a long period in being deprived of the benefits conferred on him by the

¹ Cook v. Fountain, 3 Sw., 591, 593; Cecil v. Butcher, 2 J. & W., 565.

² Holloway v. Headington, 8 Sims., 324; Jeffreys v. Jeffreys, 1 Cr. & Ph., 138.

³ Hill on Trustees, 107: see authorities there cited.

⁴ Cecil v. Butcher, 2 J. & W., 573.

⁵ Barlow v. Heneage, Prec. Ch., 211; Birch v. Belgrave, Ambl., 264; Cook v. Fountain, 3 Sw., 593.

⁶ Cook v. Fountain, *ut supra*.

deed,¹ these and the like facts will tend to establish the presumption that a trust was intended.

Where the relation between the grantor and the grantee is a near one, when a good or meritorious consideration exists, as between father and son, husband and wife, and the like, the presumption in favor of the grantee's title is much stronger than when he is a mere stranger; and, hence it requires much stronger evidence to raise a trust in favor of the grantor.²

The intention of the parties, where that can be properly ascertained, determines when the transaction shall be deemed a voluntary conveyance, and when a trust in favor of the grantor shall be presumed. Thus, where a voluntary conveyance was made between a parent and child to answer a particular purpose, that being proved, the presumption that an advancement was intended, is rebutted, and a trust results to the grantor.³

If the purpose for which a voluntary conveyance is made, be illegal, and the court, by giving effect to a trust in favor of the conveying party, would assist in defeating the policy of the law, the court will refuse to interfere, and will leave the parties to such remedies as the courts of law will give.⁴

Wherever the circumstances of the case are such

¹ *Platamore v. Staple, Coop.*, 253.

² *George v. Howard*, 7 Price, 646; *Dyer v. Dyer*, 2 Cox, 93.

³ *Cecil v. Butcher*, 2 J. & W., 565, and cases cited.

⁴ *Birch v. Belgrave*, Ambl., 264; *Legget v. Dubois*, 5 Paige, 114; *Groves v. Groves*, 3 Y. & J., 163; *Col. Pitts' case*, Ambl., 266; *Curtis v. Perry*, 6 Ves., 747; *Roberts v. Roberts*, Daniel, 143; *Fields v. Lonsdale*, 13 Beav., 787.

as to create a resulting trust upon a voluntary conveyance it will make no difference whether the relief be sought by the grantor himself,¹ or by his heirs or devisees, or personal representatives after his death.²

Sir Thomas Plumer, M. R., in his judgment in the case of *Cecil v. Butcher*, 2 J. & W., 565, &c., collected all the authorities, and considered the principles involved in them, as bearing upon cases of voluntary conveyances, and he sums them up as follows: "They have not depended singly upon the question whether the party has made a voluntary deed; not merely upon whether having made it, he keeps it in his own possession; not merely whether it is made for a particular purpose; but when all these circumstances are connected together, when it is voluntary, when it is made for a purpose that has never been completed, and when it has never been parted with; then the courts of equity have been in the habit of considering it as an imperfect instrument. If it was understood between the parties that it should only be kept in readiness to be used, if wanted; or if it is made *ex parte*, and never intended to be divulged to the grantee, unless the particular purpose requires it; the question is if there is not a *locus pœnitentiæ*, if, under such circumstances, the grantee furtively gets possession of the deed, though it is good at law, yet he has obtained it contrary to the inten-

¹ *Cook v. Fountain*, 3 Sw., 565.

² *D. of N. v. Browne*, Prec. Ch., 80; *Young v. Peachy*, Atk., 254.

tion of the grantor, who never meant him to have it; and will not a court of equity at least refuse him its assistance? This principle will be found to pervade all these cases. It may, perhaps, when the transaction is known to both parties, rest upon the supposition of a collateral agreement between them, that the deed should not be used—should not be called forth into life, unless wanted for the special purpose; and that the deed being executed on the faith of that agreement, it is contrary to good conscience and equity to call for it, and apply it beyond the purpose for which the grantee knew it to be intended.”

From the foregoing remarks it will be seen that the intention of the grantor at the time of making the instrument, if it be legal and proper and can be clearly ascertained, shall prevail. That is, “*It is the intent which guides the use,*” in these as in other cases. Hence, if it was the intention of the party at the time of making the deed, to benefit the person taking under it, a subsequent change of that intention cannot have the effect of altering the nature of the transaction, so as to convert the donee into a trustee for the grantor, or for volunteers subsequently claiming under him.¹

Where, in the deed, the conveyance is expressed to be for a valuable consideration, the court will not look narrowly into the consideration, especially when it is between father and son, or parties nearly related to each other; neither, in such cases, can

¹ Lady Hudson's case, cited 2 Vern., 476; Birch v. Belgrave, Amb., 266.

parol proof be admitted to prove that the purchaser was intended to be merely a trustee.¹

A resulting trust may arise for the donor as to a part of the property conveyed, and not as to the other part, according to the evidence from the circumstances of the case.²

It is a general rule to be observed that the court will not give effect to any trust raised upon a voluntary conveyance, where the effect of the conveyance was intended as an evasion of the law, or against public policy.³

5. WHERE THERE IS A VOLUNTARY DISPOSITION OF PROPERTY BY DEED OR WILL TO A PERSON AS TRUSTEE, AND NO TRUST IS DECLARED.

It is a well settled principle in equity that where there is a voluntary disposition of property by deed or will, to a person as trustee, and yet no trust is declared, a trust results to the donor himself, or to his heirs at law or next of kin, according to the nature of the estate.⁴ In such cases, all that is required to establish the trust, is a plain declaration on the face of the instrument that the person to whom the property is conveyed is to take it in trust. It is not necessary that the word "trust"

¹ *Leman v. Whitley*, 4 Russ., 423; *Story's Eq.*, sec. 1199, note (1) remarks on the above case; see also *Rathbun v. Rathbun*, 6 Barb. S. C., 98; also *Squire v. Harder*, 1 Paige Ch., 494.

² *Cook v. Fountain*, 3 Sw., 585.

³ *Curtis v. Perry*, 6 Ves., 746.

⁴ 10 Ves., 527; *Gooder v. Lloyd*, 3 Sim., 538; 2 Phill., 793; *Brown v. Jones*, 1 Atk., 101; *Sidney v. Shelley*, 19 Ves., 359.

or trustee appear in the instrument. Says Lord Eldon, "if the whole frame of the will creates a trust, for the particular purpose of satisfying which the estate is devised, the law is the same, though the word "trust" is not used.¹

Where a testator or grantor, by will or by deed, say expressly that the property is given upon trust and say no more, it is fully settled that the next of kin will take,¹ if it be property which goes to the next of kin, or the heir, according to the nature of the estate. Thus where a person by deed conveyed his real estate to trustees, in trust to sell after his death, for several purposes therein named, and besides that 200*l.* should be disposed of as he should by a note appoint; and he died making no appointment: It was held that there was a resulting trust of the 200*l.* for the heir at law.² For having made no appointment a trust resulted at once to himself, and through him to his heir at law, for as between the next of kin and the heir at law there will be no equitable conversion of the real estate into money.³

In determining these cases, the will of the grantor or testator, so far as it can be ascertained, governs. Thus, where a testator, after giving several legacies, continued thus: "Item—After all my

¹ *Morice v. Bishop of Durham*, 10 Ves., 537; *King v. Denison*, 1 V. & B., 273.

² *Emblyn v. Freeman*, Price's Ch., 542.

³ *Emblyn v. Freeman*, *ut supra*; *Sidney v. Shelley*, 19 Ves., 358; *Collins v. Wakeman*, 2 Ves. Jr., 683; *Corporation of Gloucester v. Wood*, 3 Hare, 131.

just debts and legacies are paid I give and bequeath the remainder of my estate real and personal, and whatever shall be due to me for half-pay, &c.," without saying more: it was considered by the court that the testator, by these words, signified an intention to dispose of the residue of his property, and that this intention converted the executor into a trustee for the *next of kin*.¹ So also where a residuary bequest was cancelled by drawing a line through it, and other alterations signifying an intention to change it, it was held that there was a resulting trust for the *next of kin*.² In the disposition of property by will, the court will follow the intention of the testator as gathered from the general import of the will, even though by so doing there should be a departure somewhat from the strict application of a general rule.

6. WHERE PROPERTY IS CONVEYED IN TRUST, BUT THE TRUST IS INSUFFICIENTLY OR INEFFECTUALLY DECLARED.

Wherever a person, competent to make a valid disposition of property, gives it and points out the object, the property, and the way in which it shall go, he creates a trust; unless he shows clearly that his will, as expressed, is to be controlled by the party to whom the property is conveyed, who may, at his option, give another direction to it.³

¹ Bp. of Cloyne v. Young, 2 Ves. Sr., 91; see 17 Ves., 435; also 2 Phill., 793.

² Mence v. Mence, 18 Ves., 348; Skrymsher v. Northcote, 1 Sw., 566.

³ Story's Eq., sec. 1068 (a), and authorities cited (1).

Says Judge Story, in his *Equity Jurisprudence*, sec. 1069, "the doctrine of thus construing expressions of recommendation, confidence, hope, wish and desire, into positive and peremptory commands, is not a little difficult to be maintained, upon sound principles of interpretation of the actual intention of the testator. It can scarcely be presumed that every testator should not clearly understand the difference between such expressions and words of positive direction and command; and that in using the one and omitting the other he should not have a positive end in view. It will be agreed on all sides, that where the intention of the testator is to leave the whole subject, as a pure matter of discretion, to the good will and pleasure of the party enjoying his confidence and favor, and where his expressions of desire are intended as mere moral suggestions to excite and aid that discretion, but not absolutely to control or govern it, there the language cannot, and ought not, to be held to create a trust. Now, words of recommendation and other words precatory in their nature, imply that very discretion, as contradistinguished from peremptory orders, and therefore ought to be so construed, unless a different sense is irresistibly forced upon them by the context."¹ Accordingly, in more modern times, a strong disposition has been indicated not to extend this doctrine of recommendatory trusts, but as far as the authorities will allow to give to the words of wills their natural and ordinary sense,

¹ *Meredith v. Heneage*, 1 Sim. R., 542.

unless it is clear that they are designed to be used in a peremptory sense.”¹ Says the Vice Chancellor in the case of *Sale v. Moor*, *ut supra*, “the first case that construed words of recommendation into a command, made a will for the testator, for every one knows the distinction between them.” The current of decisions of late years has been against converting the legatee, in such cases, into a trustee.²

In note (1) to sec. 1069 of Story's Equity (from which the above authorities are taken) it is remarked, “that a strong case, illustrative of the doctrine now maintained, is that of *ex parte Payne* (2 Younge & Coll., 646). “There the testator devised his estate to his daughter, as some reward for her affectionate, unwearied and unexampled attention to him during his illness of many years,” and then added, “I strongly recommend to her to execute a settlement of the said estate, and thereby vest the same in trustees, &c., for the use and benefit of herself for life, with remainder to her husband and his assigns for life, with remainder to all and every the children she may happen to have, if more than one, share and share alike; and if but one, the whole to such one; or to such other uses as my said daughter shall think proper; to the intent, that the said estate, in the event of her marriage, shall be effectually protected and secured:” and

¹ *Sale v. Moor*, 1 Sim., 534; *Wright v. Atkyns*, 1 V. & Beam., 315.

² *Meredith v. Heneage*, 1 Sim. R., 542; *Wright v. Atkyns*, *ut supra*; *Lechmere v. Lavie*, 2 Mylne & Keen, 197; *Lawless v. Shaw*, 1 Lloyd & Gould R., 154; *Benson v. Whitman*, 5 Sim. R. 22; *Podmore v. Gunning*, 7 Sim. R., 644; *Wood v. Cox*, 1 Keen R., 317.

Lord Chief Baron Abinger held that the daughter took an absolute estate.¹

Judge Story² sums up thus, "wherever, therefore, the objects of the supposed recommendatory trusts are not certain or definite; wherever the property to which it is to attach is not certain or definite; wherever a clear discretion and choice to act, or not to act, is given; wherever the prior dispositions of the property import absolute and uncontrollable ownership; in such cases courts of equity will not create a trust from words of this character.³ In the nature of things, there is a wide distinction between a *power* and a *trust*. In the former, the party may or may not, act in his discretion; in the latter the trust will be executed, notwithstanding his omission to act."

Lord Eldon said,⁴ "that in order to determine whether a trust of this sort is a trust which a court of equity will interfere with, it is a matter of observation: first, that the words should be imperative; secondly, that the subject must be certain; and thirdly, that the object must be as certain as the subject."

In *Pope v. Pope*⁵ the testator gave whatever property or effects he might die possessed of, (after his debts were paid,) or might become entitled to, to his wife; and appointed her sole executrix of his

¹ *Ford v. Fowler*, 3 Beavan R., 146, 147; *Knight v. Knight*, 3 Beavan R., 148 to 172; *Tallmage v. Sill*, 21 Barb., 34.

² Story's Eq., sec. 1070.

³ See authorities cited, Story's Eq., sec. 1070, note 1.

⁴ *Wright v. Atkyns*, 1 Turn. & Russ., 157.

⁵ 10 Sim. R., 1.

will, and added: "And my reason for so doing is the constant abuse of trustees which I daily witness among men; at the same time, trusting she will, from the love she bears to me and our dear children, so husband and take care of what property there may be, for their good; and should she marry again, then I wish she may convey to trustees, in the most secure manner possible, what property she may then possess, for the benefit of the children, as they may severally need or deserve, taking justice and affection for her guide." At the conclusion of his will he gave the capital of his business to his wife, trusting that she would deal justly and properly to and by all his children. It was held that no trust was created for the children.

In the case of *Knight v. Knight*,¹ Lord Langdale said, "but it is not every wish or expectation which a testator may express, nor every act which he may wish his successors to do, that can or ought to be executed, or enforced as trusts in this court; and in the infinite variety of expressions which are employed, and of cases which thereupon arise, there is often the greatest difficulty in determining whether the act desired or recommended is an act which the testator intended to be executed as a trust, or which this court ought to deem fit to be, or capable of being enforced as such. In the construction and execution of wills, it is undoubtedly the duty of this court to give effect to the intention of the testator, whenever it can be ascertained. But in cases of this nature,

¹ 3 Beavan R., 148, 172 to 175; see note to sec. 1070, Story's Eq.

and in the examination of authorities which are to be consulted in relation to them, it is, unfortunately, necessary to make some distinction between the intention of the testator, and that which the court has deemed it to be its duty to perform. For of late years, it has frequently been admitted by judges of great eminence, that by interfering in such cases, the court has, sometimes, rather made a will for the testator than executed the testator's will according to his intentions: and the observation shows the necessity of being extremely cautious in admitting any, the least, extension of the principle to be extracted from a long series of authorities, in respect of which such admissions have been made. As a general rule it has been laid down, that, when property has been given absolutely to any person, and the same person is, by the giver, who has power to command, recommended or entreated or wished to dispose of that property in favor of another, the recommendation, entreaty or wish shall be held to create a trust: first, if the words are so used that, upon the whole, they ought to be construed as imperative; secondly, if the subject of the recommendation or wish be certain; and thirdly, if the objects or persons intended to have the benefit of the recommendation or wish, be also certain. In simple cases there is no difficulty in the application of the rule thus stated. If a testator gives a thousand pounds to A. B., desiring, wishing, recommending, or hoping that A. B. will, at his death, give the same sum or any part of it to C. D., it is considered that C. D. is an object of the testator's bounty, and

A. B. is a trustee for him. No question arises upon the intention of the testator, upon the sum or subject intended to be given, or upon the person or object of the wish. So if the testator gives the residue of his estate, after certain purposes are answered, to A. B., recommending A. B., after his death, to give to his own relations, or such of his own relations as he shall think most deserving, or as he shall choose, it has been considered that the residue of the property, although a subject to be ascertained, and that the relations to be selected, although persons or objects to be ascertained, are nevertheless so clearly and certainly ascertainable, so capable of being made certain, that the rule is applicable to such cases. On the other hand, if the giver accompanies his expression of wish, or request, by other words, from which it is to be collected that he did not intend the wish to be imperative; or if it appears from the context that the first taker was intended to have a discretionary power to withdraw any part of the subject from the object of the wish or request; or if the objects are not such as may be ascertained with sufficient certainty, it has been held that no trust is created. Thus the words "free and unfettered," accompanying the strongest expressions of request, were held to prevent the words of request being imperative. Any words by which it is expressed or from which it may be implied that the first taker may apply any part of the subject to his own use, are held to prevent the subject of the gift from being considered certain; and a vague description of the object, that is, a description by which

the giver neither clearly defines the object himself, nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interest the object or class of objects is to take, will prevent the objects from being certain within the rule. And in such cases we are told (2 Ves., jr., 632, 633,) that the question never turns upon the grammatical import of the words, they may be imperative, but not necessarily so; the subject matter, the situation of the parties, and the probable intent must be considered.¹

Where the objects of a trust are too indefinite to afford any certainty, the courts of equity will not execute the trust, but the property will fall into the *residuum* of the testator's estate, as it is clear that the legatee or devisee is not to take for his own use.² But in the description of objects or persons in recommendatory trusts, it is not indispensable that the persons should be described by name, in order to sufficient certainty. If the context, when duly considered, fixes the particular persons clearly and definitely by referring to the distinct class out of which the trustee is to select, as, to the "sons," "children," "family" and "relations," the description will be deemed to be a sufficient designation.³

Wherever the *subject* to be administered as trust property, and the *quantum* of the subject are left so

¹ See also 10 Ves., 536; *Knight v. Boughton*, 11 Clark & Finnel R., 548.

² *Stubbs v. Sargon*, 2 Keen R., 255; *S. C.* 3 Mylne & Craig, 507; *Omany v. Butcher*, 1 Turn. & Russ., 260; *Ford v. Fowler*, 3 Beavan R., 146, 147; *Story's Eq.*, sec. 979 (a), 1071, 1183, 1068 (a), note 1.

³ *Pierson v. Garnet*, 2 Bro. Ch. R., 38; *Forbs v. Ball*, 3 Meriv. R., 437; 1 *Powel on Devises*, by Jarman, 274, and note 7; *Story's Eq.*, sec. 1071.

indefinite, that it would be impossible for the court to say *what* should be applied, the difficulty which would thus be imposed upon the court, has been the foundation of the argument, that no trust was intended.¹ Thus, where a testator bequeathed to his wife all the *residue* of his personal estate, "not doubting but that she will dispose of what shall be left at her death, to our two grand-children:" It was held that the uncertainty of the subject to which the bequest should attach, defeated it, as a recommendatory trust. This would leave the subject at the *option* of the devisee, so far as *quantum* was concerned, which is always fatal to the trust.² So, where the testator bequeathed to his wife all the residue of his estate, "recommending to her, and not doubting, as she has no relations of her own family, but that she will consider my near relations, should she survive me, as I should consider them myself, in case I should survive her." Here, the uncertainty both of the subject and of the objects of the trust was so great, that the court could not execute it, and consequently it was held that the words did not create a trust.³

As to what cases the court will establish a resulting trust where there is an imperfect declaration of the foregoing description, in opposition to the claims

¹ Wright v. Atkyns, 1 Turn. & Russ., 159.

² Wynne v. Hawkins, 1 Bro. Ch. R., 179; Pushman v. Filliter, 3 Ves. 7; Eade v. Eade, 5 Mad. R., 118; Curtis v. Sippon, 5 Mad. R., 494; Story's Eq., sec. 1073, note 3.

³ Sale v. Moore, 1 Sim. R., 534; Att'y Gen. v. Hall, cited 2 Cox R., 355; see Podmore v. Gunning, 7 Sim. R., 614; Wood v. Cox, 1 Keen R., 317; Story's Eq., 1073, and authorities, note 1.

of the donee, there can be no other rules laid down than the foregoing. If the intention of the donor is clearly and imperatively expressed, if the subject of the trust is clearly defined, and the objects certainly designated, the court will decree the trust; but these questions must be decided upon the construction of the language in each particular case.¹

In the case of *Sale v. Moore*² the Vice-Chancellor said, "the first case which construed words of recommendation into a command, made a will for the testator; for every one knows the distinction between them. The current of decisions of late years has been against converting a legatee into a trustee." Illustrative of this class of cases are the following: In the case of *Morice v. Bishop of Durham*, the testatrix had bequeathed all her personal estate to the Bishop, his executors &c., upon trust, to pay her debts and legacies, &c., and to dispose of the ultimate residue "to such objects of benevolence and liberality as the Bishop in his own discretion should most approve of," and she appointed him her sole executor. In this case, the Master of the Rolls held, that it was clear, from the words of the will, that this was a gift upon some trust, and not for the personal benefit of the Bishop; but that the trust was too indefinite for the court to execute even as a gift to charity, and that there was therefore a resulting trust to the *next of kin*: and this decision of the Master was affirmed by Lord Eldon.³

¹ *Ellis v. Shelby*, 1 M. & K., 298.

² 1 Sim. R., 534.

³ *Morice v. Bishop of Durham*, 9 Ves., 399, on appeal, 10 Ves., 522; *Owens v. The Missionary Society of the M. E. Church*, 4 Kern., 380.

In *James v. Allen*,¹ the testatrix had bequeathed all her personal estate to three persons whom she appointed her executors, in trust to be by them applied and disposed of for and to such benevolent purposes as they in their integrity and discretion may unanimously agree on. The Master of the Rolls decided that this was a trust in the executors; but that it was void for uncertainty, and therefore distributable among the *next of kin*. In *Vezey v. Janson*,² the testator gave the residue of his estate to his executor upon trust in default of appointment by him, "to pay and apply the same in and toward such charitable or public purposes, as the laws of the land would admit of, or to any person or persons, and in such shares &c., as his executors should, in their discretion, will and pleasure, think fit." Sir John Leach, Vice-Chancellor, decided that the trust was too general and undefined to be executed by the court; that the executors could not take, because the gift was expressly made to them in trust: and the next of kin were therefore entitled.³

In each of the foregoing cases it is most apparent that the intentions of the testator or testatrix were not carried out by the action of the court. Although a trust was created by the language of the instruments, either as to a part or the whole of the property given, yet from the language, taken together

¹ 3 Mer., 17.

² 1 S. & S., 69.

³ See likewise *Fowler v. Garlic*, 1 R. & M., 232; also *Ellis v. Shelby*, 7 Sim., 352; S. C. on appeal, 1 M. & Cr., 286; also *Stubbs v. Sargon*, 2 Keen, 255; S. C. on appeal, 3 M. & Cr., 507.

as a whole, it is most apparent that special confidence was reposed in the executors named; a confidence in their capacity, their judgment and fidelity to administer the property in a manner more satisfactory to the testator than would be any specific direction which the testator was then able to give. Although it was apparent that the testator did not intend the executor or executors to take beneficially, it was equally apparent likewise, that he preferred leaving the disposition of his property to the judgment, discretion and fidelity of his executor, rather than to his heir or next of *kin*: and the court would have better performed its duty in the premises by leaving it where the testator placed it.

Such decisions should hardly be received as authority, when they appear to be in violation of the very principles they profess to observe in making them. "It is the intention which guides the use," says the court, therefore carry out as far as possible, the lawful intention of the donor. If the testator did not declare the subjects or objects of the trust with a sufficient degree of particularity, it was because, at the time, he could not be sufficiently informed to specify such particulars; and therefore he did what he could, by selecting those in whose judgment and integrity he had confidence, and committed his property to their keeping, to be disposed of at their discretion: signifying to them his general wish in the instrument appointing them to their office.

Therefore it is well remarked by Judge Story:¹

¹ Story's Eq., sec. 1069.

“that, where the intention of the testator is to leave the whole subject, as a pure matter of discretion, to the good will and pleasure of the party enjoying his confidence and favor; and where his expressions of desire are intended as mere moral suggestions, to excite and aid that discretion, but not absolutely to control and govern it, there the language cannot and ought not to be held to create a trust.” “Accordingly, in more modern times, a strong disposition has been indicated not to extend this doctrine of commendatory trust, but, as far as the authorities will allow, to give to the words of wills, their natural and ordinary sense, unless it is clear that they are designed to be used in a peremptory sense.”¹

The current of modern decisions is, that no resulting trust will be raised and established against the donee, unless the testator has sufficiently expressed his intention that they should only take for the benefit of another. Thus, in the case of *Hughes v. Evans*,² a testator devised all his freehold estates to his most dutiful and respectful nephew E., “upon the trust and for the uses following,” but he did not declare any use or trust except as to one estate. The Vice-Chancellor held that from the context of the will, and of a codicil by which a personal charge in favor of the testator’s son was imposed on E., there was no resulting trust in favor of his heirs. So also in the case of *Ralston v. Telfair*,³ where the testator gave the residue of his estate, after payment

¹ Story’s Eq., sec. 1069, and authorities cited in note 1.

² 13 Sim., 496.

³ 2 Dev. Eq., 255.

of debts and legacies, to his executors "to be disposed of as they think proper," it was held that the executors took beneficially, and that parol evidence was not admissible to show that they took in trust.

In the case of *Gibbs v. Rumsey*¹ the testatrix gave "all the rest and residue of the moneys arising from the sale of my said estates, all the residue of my personal estate, after payment of my debts and legacies, &c., unto my said trustees and executors, to be disposed of unto such person or persons, and in such manner and form, and in such sum and sums of money as they in their discretion shall think expedient." Sir William Grant, M. R., decided that there was no sufficient indication on the part of the testatrix to create a trust, and that the residuary donees took the absolute beneficial interest, against the heirs and next of kin.

7. WHERE AN ESTATE IS CONVEYED ON PARTICULAR TRUSTS WHICH FAIL OF TAKING EFFECT.

A resulting trust arises where there is a disposition of real or personal property, which fails in the whole or in part, either from being void *ab initio*, or from the happening of some subsequent event, which renders the intended disposition of it impossible. In cases of this character, the trust resulting, unless otherwise disposed of, will go to the grantor, donor, his heirs at law or the next of kin.

¹ 2 V. & B., 294.

1. *Those trusts which fail of taking effect because they are void ab initio.*

Thus where the gift is rendered void by statute, or where it is against the policy of the law, or where the trust is held for an illegal purpose, in these and the like cases, a resulting trust will be created, and the donee will become a trustee, according to the nature of the property, for the *heir at law*, or for the *next of kin* of the donor. Where the subject of the disposition that fails is *personal estate*, and where there is no general residuary gift, or where it is not the whole or a part of the residuary gift itself, that fails, there a resulting trust will arise for the next of kin;¹ but if the subject of the disposition, under like circumstances, be *real estate*, a resulting trust arises for the heir at law.²

Where land is directed to be converted into money, and the proceeds thereof to be applied to purposes which are illegal and void, a trust will result to the heir at law;³ or where the disposition which fails applies to a defined and ascertained portion of the property, which is excepted and separated from the rest, and is devoted to that purpose, which fails or cannot take effect; the one taking that property, subject to the disposition so failing,

¹ *Skrymsher v. Northcote*, 1 Sw., 566; *McDonald v. Bryce*, 2 Keen, 276; *Eyre v. Marsden*, 2 Keen, 564; *Johnson v. Clarkson*, 3 Rich. Eq., 305; *Finley v. Hunter*, 2 Strob Eq., 218.

² *Carriek v. Errington*, 2 P. Wm., 361; *Tregonwell v. Sydenham*, 3 Dow, 194; *Eyre v. Marsden*, 2 Keen, 564; *McDonald v. Bryce*, 2 Keen, 276; *King v. Strong*, 9 Paige Ch., 94, also 20 Wend., 458; *Hoff*, 202.

³ *House v. Chapman*, 4 Ves., 542; *Gibbs v. Rumsey*, 2 V. & B., 294; *Eyre v. Marsden*, 2 Keen, 564; 6 Paige, 600; 20 Wend., 457.

will hold as trustee for the heir at law, or next of kin, according to the nature of the estate.¹

But where the gift is of a sum of money which is directed to be raised out of the estate, and applied to purposes which are void, or which lapse, the question arising is, whether the void or lapsed gift is a *charge* upon the estate, or whether it is a *condition* to, or an *exception* out of the gift.² It has been decided that where an estate is given, *charged* with a sum of money upon a contingency, which contingency does not happen, that no trust results; but the charge sinks to the benefit of the donee.³ Upon the same principle where an estate is absolutely given, *charged* with the payment of a sum of money for illegal purposes, there should be no resulting trust; but the failing interest should go to the donee.⁴ It has been questioned whether there should not be a distinction between *charges* void *ab initio*, and those failing by lapse; and the case of Noel, *v.* Lord Henly,⁵ in the House of Lords, has been supposed to be an instance of the kind. In that case Lord Wentworth devised certain estates to trustees to sell, and out of the produce to pay, amongst other sums, 5,000*l.* to his wife; and after those purposes, he directed his trustees to invest the residue upon certain trusts. The wife died during the lifetime of the testator. The question

¹ Cook *v.* Stationers' Co., 3 M. & K., 264, etc.

² King *v.* Denison, 1 V. & B., 275.

³ Att'y Gen. *v.* Milner, 3 Atk., 112; Croft *v.* Slee, 4 Ves., 60, also see Sydenham *v.* Tregonwell, 3 Dow, 212; Tucker *v.* Tucker, 1 Seld., 104.

⁴ Poor *v.* Mial, 6 Mad., 32.

⁵ 1 Dan., 322, 211; Bowers *v.* Smith, 10 Paige, 193.

then arose, whether the 5,000*l.* devolved upon the heir at law, upon the next of kin, or whether it belonged to the persons entitled to the residue. Both at the original hearing and on an appeal to the House of Lords, it was held, that by the lapse, the residuary legatees were entitled.

There are many decisions which seem conflicting on these points. But they all profess to be governed by the same general rules, and seem to concur in this; that where there is an express gift of an estate to a person, *charged* with paying certain legacies, which fail, either from being void or from lapse, there will be no resulting trust, in consequence of the failure; but the donee will be entitled to the benefit.¹ It would seem from an examination of each particular case that the *intention* of the testator, as gathered from the terms of the devise, had governed in these decisions; and that, where the intention that the donee should absolutely have the estate *thus charged*, appeared, if the charge failed, it would then go for the benefit of the donee.

It is a well settled principle that a residuary bequest operates upon all the personal estate of the testator at the time of his death. This must include all bequests of personal estate which fail during the life of the testator, whether from illegality or from lapse.² Therefore, in all cases where there is a re-

¹ Jackson v. Hurlock, Ambl., 487, and 2 Ed., 263; King v. Denison, 1 V. & B., 260; see also Cook v. Stat. Co., 3 M. & K., 262; Henchman v. Att'y Gen., 3 M. & K., 493; King v. Mitchel, 8 Peters, 326.

² Jackson v. Kelley, 2 Ves. Jr., 285; Brown v. Higgs, 4 Ves., 708; Cambridge v. Rous, 8 Ves., 12.

siduary legatee, and the subject of the disposition which fails, is personal estate, there will be no resulting trust to the next of kin, unless the failing disposition be the whole or a part of the residuary gift,¹ in such cases there will be a resulting trust to the next of kin. It is also held, that a residuary bequest on condition to apply it for an illegal purpose, created a resulting trust for the next of kin.²

Where property is directed to be converted for purposes which fail, from being void *ab initio*, the interest thus failing, will not be converted, but will result to the heir at law, if the subject be real estate, and to the next of kin if it be personal estate.³ The rule is this: The heir is not excluded by the *direction* to convert real property into personal, but by the *disposition* of the converted property; and then, only to the extent of that disposition;⁴ consequently where there is no disposition of the property directed to be converted, the heir is not excluded, as in cases where the attempted disposition is illegal and void.⁵

It has been decided that where real estate has been directed to be sold, and the proceeds of the sale blended with the personal estate generally, and the fund thus created is directed to be applied to

¹ Skrymsher v. Northcote, 1 Sw., 566; McDonald v. Bryce, 2 Keen, 276; Eyre v. Marsden, 2 Keen, 564; Floyd v. Barker, 1 Paige Eq. R., 480; Frazier v. Frazier, 2 Leigh, 642; Johnson v. Clarkson, 3 Rich. Eq., 305.

² Finley v. Hunter, 2 Strob. Eq., 218; Johnson v. Clarkson, *ut supra*.

³ 2 Jarm. Pow. Div., 75, 77.

⁴ Hill v. Cook, 1 V. & B., 173; 2 Jarm. Pow. Div., 77, and cases cited; Wilson v. Major, 11 Ves., 205; Hill on Trustees, 127, and authorities cited.

⁵ House v. Chapman, 4 Ves., 542; Gibbs v. Rumsey, 2 V. & B., 294.

purposes which fail, either from lapse or from being void, that the interest thus becoming undisposed of, will result, the real estate to the heir, and the personal estate to the next of kin.¹ But if it appear to have been the testator's intention that the proceeds of his real estate, directed to be sold, should be considered, for all purposes, personal estate, then the heir will be excluded.²

Where a particular estate, as a life estate, upon the determination of which remainders are limited, fails from being void, those remainders will not be accelerated by such failure; but the beneficial interest in the failing disposition, until the event happens upon which the remainders are limited to take effect, will result to the heir at law, as in the case of *Carrick v. Errington*³ an estate was settled by deed, in trust, after the death of the settler, for a Papist, for life, with remainders over after the death of the Papist. The life estate given to the Papist being void at that time, the effect of the failure did not accelerate the estate of the remainder man, but the rents and profits during the life of the Papist resulted to the heir at law.³

But it has been held that a legacy to A. for life, with remainders over, does not lapse on the death

¹ *Akroyd v. Smithson*, 1 Brown C. C., 503; *Amphlett v. Park*, 2 R. & M., 221; *Johnson v. Wood*, 2 Beav., 409.

² *Durvor v. Smithson*, 1 Ves. Sr., 108; *Phillips v. Phillips*, 1 M. & K., 649; see also *Craig v. Leslie*, 3 Wheat., 583; *Burr v. Sims*, 1 Whar., 263; *Morrow v. Brenizer*, 2 Rawle, 185.

³ 2 P. Wm., 361; see also *Tregonwell v. Sydenham*, 3 Dow, 194; also *McDonald v. Bryce*, 2 Keen, 276; *Eyre v. Marsden*, 2 Keen, 564, and S. C. 4 M & Cr., 231.

of A., during the lifetime of the testator,¹ so also in *Yeaton v. Roberts*² it was held that a devise of real and personal property, with vested remainders in succession, did not lapse by the incapacity or refusal of the first taker, but passed at once to the next in succession.²

Where there has been a valuable consideration on a conveyance, there will be no resulting trust to the grantor, on the failure of the trust, even in the case of a charity.³

Where a devise to two is made in terms absolute with a secret understanding with one that the land is to be held in trust for illegal purposes, there is a resulting trust against both devisees.⁴

2. *Where trusts are created which fail of taking effect from the happening or non-happening of subsequent events, which render the intended disposition impossible.*

Cases of this kind may occur under a variety of circumstances, as, where a devise is made, and the devisee dies during the lifetime of the testator: or where a devise is made to one conditioned that a legacy be paid to another provided he arrive at a certain age, and he die before attaining such age, etc.

Where there is a disposition of property, real or

¹ *Dunlap v. Dunlap*, 4 Desaus., 305, 314; *Richmond v. Vanhook*, 3 Ired. Ch., 581.

² 8 Foster, 459, and see also *Mahorner v. Hooe*, 9 S. & M., 247.

³ *Gibson v. Armstrong*, 7 B. Monr., 481; *Kerlin v. Campbell*, 15 Penn. St., 500.

⁴ *Russell v. Jackson*, 10 Hare, 204.

personal, which fails of its object from the happening of some subsequent event, as a general rule, there will arise a resulting trust of that failing disposition, either for the heir at law or for the next of kin, according to the real or personal character of the estate.¹ This lapse, however, may be otherwise provided for by the testator, by a gift by way of substitution to some other person, which will prevent the lapsed estate from going to the heir at law or next of kin, by a resulting trust.²

Difficult questions often arise touching these failing dispositions, whether they shall go to the heir at law, to the next of kin, or whether they shall sink for the benefit of the donee. There are certain principles governing in the decisions of these questions which are generally recognized, and which the courts profess to maintain; but nevertheless, through misapprehension or misapplication of them, there has arisen some confusion, and consequent contradiction or conflict of authorities.

One thing is clear: the legal intention of the testator or grantor, so far as it can be ascertained and be carried out, is to prevail, under the principle that *the intent governs the use*.³ Therefore where it is clear that the testator intended the donee to have the property absolutely as his own, charged, however, with the payment of certain legacies, debts,

¹ 2 Jarm. Pow. Div., 32; 1 Rep. Lega., 627; Hill on Trustees, 134.

² Rose v. Rose, 17 Ves., 347; Price v. Hathaway, 6 Mad., 304; Caw v. Robinson, 1 Seld., 125.

³ Hill on Trustees, 141, and Jackson v. Hurlock, Ambl., 487, and 2 Ed., 263; King v. Denison, 1 V. & B., 260.

trusts, or otherwise, which, from certain contingencies not happening, fail, the donee takes the property absolutely, and such failing disposition sinks to the benefit of the donee.¹

But if the object of the testator is not to confer the property upon the donee for his own benefit, but for the purpose of making him a trustee for certain uses and trusts, and those uses or trusts fail, either by lapse or from being against the policy of the law, the failing disposition will not, in such cases, sink to the benefit of the donee; but a trust will result to the heir at law, if the property be *real estate*, or to the next of kin, if it be *personal estate*.

The testator, however, may have contemplated such failure, and have made provision for it by gift by way of substitution to some other person. Where this is the case, the heir at law, or next of kin or others, claiming against such disposition, will be excluded.² But where there is no such provision, and there is a failure of the disposition, even though it be but to a part of the property or interest, if that part is well defined, and is so excepted out, and separated from the rest that it can be clearly ascertained, the person taking the property so failing, will hold as trustee for the heir at law or next of kin, according to the nature of the estate.³

When the gift which fails is of a sum of money

¹ Att'y Gen. v. Milner, 3 Atk., 112; Croft v. Slee, 4 Ves., 60; see also Stone v. Massey, 2 Yates, 369; Smith v. Wiseman, 6 Ired. Eq., 540; Sydenham v. Tregonwell, 3 Dow., 212.

² Rose v. Rose, 17 Ves., 347.

³ Cook v. Stationers' Co., 3 M. & K., 264, 265.

which is directed to be raised out of the estate, and the estate is ordered to be sold for that purpose, and is devised to an individual for the purpose of clothing him with proper authority, and vesting him with the necessary powers to execute such trust, it is clearly in accordance with the will of the testator, on the failure of such gifts, to raise a resulting trust for the benefit of the heir at law or next of kin, according to the nature of the estate.

Where a person dies intestate, it is to be presumed that it is in accordance with his wishes, that his property shall be distributed according to the known principles of law which govern in such cases. But where, by will, properly authenticated, he has signified a desire that his property shall be differently applied, that disposition being legal, the court will endeavor to execute the will according to such expressed intent.

Upon this principle, when the testator has clearly expressed his intention, that his real estate shall be sold, and shall, for all purposes, be considered as personal estate, it will be so considered by the court: and all gifts or legacies, which were to be paid out of this fund so raised, failing, will go to the next of kin, as against the heir at law.¹ The reason for this is obvious. The testator evinced an intention to deprive the heir at law of it, by converting it into personal property. Now, in the absence of any other valid disposition of it, by the testator, the law

¹ *Duror v. Motteux*, 1 Ves. Sr., 108; *Phillips v. Phillips*, 1 M. & K., 649; see *Craig v. Leslie*, 3 Wheat., 583; *Burr v. Sim*, 1 Whart., 263; *Morrow v. Brenizer*, 2 Rawle, 185.

would cast the estate upon the next of kin, which, it is to be presumed, the testator intended.

Where the gifts are of sums of money and the real estate is ordered to be sold for the purpose of raising these sums, and these gifts are void *ab initio*, from being against the policy of the law, no conversion takes place. For the testator has signified no intention which the law can execute: and, therefore, the person taking the estate for such purposes, under the will, becomes trustee for the heir at law. The reason is obvious. The doctrine of conversion is an equitable one; and arises from considering "that *as done* which is *intended* to be done, and which *ought* to be done."¹ But where the estate is ordered to be sold, after the death of the testator, for an illegal purpose, the court can not consider that order as one that *ought* to be executed; and, therefore, the doctrine of equitable conversion will not apply.

The case, upon principle, will be the same whether the gifts, failing, embrace the whole or only a part of the testator's legacies. If the testator has signified his intention that the estate shall be sold for the purpose only of raising the means of paying these legacies, a part of which fail, by lapse or otherwise, during the lifetime of the testator, to the extent of such failures, there will be no conversion at the death of the testator; but the failing disposition will go to the heir at law, or to the next of kin, according to the nature of the estate² For as

¹ Story's Eq., sec. 792, 1212.

² Finley v. Hunter, 2 Strob. Eq., 218; Johnson v. Clarkson, 3 Rich. Eq., 305.

between the heir and the next of kin there is no equity.

A residuary bequest operates upon all the personal estate of which the testator is possessed at the time of his death. Therefore, when it is the intention of the testator to convert his *real* into *personal estate*, for the purpose of paying off gifts and legacies, which are legal and proper, and if there be a residuary legatee to whom all the estate is to go after paying legacies, etc., so that evidently there can be no intention to have any portion of the estate go to the heir at law or next of kin, if any of the legacies lapse, from the death of the legatee in the lifetime of the testator or otherwise, the failing disposition will go to the residuary legatee.¹ This is upon the principle of an equitable conversion, following the intention of the testator, that the *real* should be converted into *personal estate*, for legal purposes; and in case of lapse it goes to the residuary legatee, in pursuance of the manifest intention that the whole estate remaining, after subserving certain purposes, should go to the residuary donee.

But upon the forgoing principle, if that which fails is the whole or a part of the *residuary gift itself*, the estate having been converted into per-

¹ Jackson v. Kelley, 2 Ves. Jr., 285; Brown v. Higgs, 4 Ves., 708; Cambridge v. Rous, 8 Ves., 12; Leak v. Robinson, 2 Merc., 363; Bland v. Bland, 2 J. & W., 406; Jones v. Mitchell, 1 S. & S., 298; King v. Woodhull, 3 Edw. Ch., 79; Marsh v. Wheeler, 2 Edw. Ch., 156; Woolmer's Estate, 3 Whart., 479; Johnson v. Johnson, 3 Ired. Eq., 427; Taylor v. Lucas, 4 Hawks, 215.

sonal property, and there being no other disposition of it indicated by the testator, the failing disposition will go to the next of kin, rather than to the heir at law.¹ In the case of *Finley v. Hunter*² it was held that a *residuary bequest* on condition to apply it for illegal purposes, created a resulting trust for the next of kin.³

If an estate be devised, charged generally with legacies, and it is uncertain what part of the devised estate will be required for satisfying them, and any of those legacies fail, there will be no resulting trust to the heir at law; but the devisee shall have the benefit of the failure.³ It might be otherwise if the legacies were made an exclusive charge upon the real estate, or were so charged that they could be excepted out, or separated from that given to the devisee.³

Lord Eldon attempted to state the result of the various decisions upon this point. He declared the result to be, "That if the estate is given to the devisees in such a way that a charge is to be created by the act of another person, raising the question between that person and the devisees, the heir has no claim; but if the deviser himself has created the charge, and to the extent of that charge, the intention appears on the face of the will not to give the estate to the devisees, it will, to the extent of

¹ *Skrymsher v. Northcote*, 1 Sw., 566; *McDonald v. Bryce*, 2 Keen, 276; *Eyre v. Marsden*, 2 Keen, 564; *Floydd v. Barker*, 1 Paige Eq. R., 480; *Frazier v. Frazier*, 2 Leigh, 642; *Johnson v. Clarkson*, 3 Rich. Eq., 305.

² 2 Strob. Eq., 218; see also *Johnson v. Clarkson*, 3 Rich. Eq., 305.

³ *Kennel v. Abbott*, 4 Ves., 811; 2 Jarm. Pow. Dev., 44, 90.

that charge, the particular object failing, go to the heir.¹

The rule of Lord Eldon seems to embrace no more than this: that when the evidence is that the testator intended the devisees to have the estate thus charged, or intended the estate to be converted, if necessary, into means for paying these legacies, and intended the whole to go to the devisees, that manifest intention of the testator would exclude any claim of the heir. But if it appeared upon the face of the will that the deviser did not intend to give the estate to the devisees, but only to make their legacies a charge upon the estate, in that case, the object failing, there would arise a resulting interest to the heir at law.

The authorities do not seem to make a distinction between those cases where the charge upon the estate is void *ab initio*, or where it fails by lapse. It has been supposed that the decision in the case of *Noel v. Lord Henley*, in the House of Lords,² was founded on a distinction of this nature. There may be a good and sufficient reason for making such a distinction. Where gifts are properly charged upon an estate, in equity, a conversion takes place upon the death of the testator, and the *real*, for all such purposes, becomes *personal* estate. If the proposed gift be *void ab initio*, no such conversion can take place; for equity converts that only which is intended to be done, and which ought to be done;

¹ *Sidney v. Shelly*, 19 Ves., 363.

² 1 Dan., 211, 322.

and a gift for illegal purposes never ought to be executed ; and equity can make no conversion in its favor.

The case of *Hutchinson v. Hammond*¹ was considered as decisive of the law applicable to lapsed legacies, when they were to be paid out of moneys raised by the sale of real estate, etc. In this case A. had devised certain lands to trustees to sell, and invest the money produced by the sale, in the funds, in trust for H. for his life, and, after his decease, to pay certain sums of money, including £1,000 to G. P., then in trust, to pay all the residue of said principal money and interest to B. C.; and she gave the residue of her *personal estate* to H. G. P. died during the life time of the testatrix. Mr. Justice Buller, sitting for Lord Thurlow, held, after much argument, that the lapsed sum did not fall into the particular or general residuum but went to the heir at law. He said there was no apparent intention against the heir. This decision was affirmed by Lord Thurlow,² his lordship observing that “ the testatrix having said nothing as to the £1,000 the heir was not defeated. The merely directing an appropriation of a part, would not defeat the claim of the heir, as to that part which was not disposed of.” This case was followed by others, holding to the same doctrine, until the case of *Noel v. Lord Henley*³ was made much to the surprise of the profession.

¹ 3 Bro. C. C., 128.

² 3 Bro. C. C., 148; *Collins v. Wakeman*, 2 Ves. Jr., 683; *Gibbs v. Rumsey*, 2 V. & B., 294; *Jones v. Mitchel*, 1 S. & S., 294.

³ 1 Dan., 211, 322; 7 Pri., 240.

A careful examination of the two classes of cases will do much to reconcile the apparent conflict. In the case of *Hutchinson v. Hammond*, Mr. Justice Buller held that the lapsed sum did not fall into the particular or general residuum, and, because he discovered no "apparent intention against the heir," he concluded that it went to the heir at law. His reasoning upon the facts of the case might have been thus: "The intention of the testatrix must govern so far as that is legal, and can be ascertained. She ordered certain lands to be sold, and the proceeds to be invested in certain funds, for specific purposes. By the will she kept the funds separate from the personal estate, and therefore she did not intend to treat them as *personal estate*. The £1,000 was of the real estate, and had lapsed before the death of the testatrix; therefore there was no constructive conversion of the real estate at the time of the death of the testatrix, so far as concerned the £1,000; and for these reasons the lapsed disposition must go to the heir at law, against whom he could find no 'apparent intention' in the will." And Lord Thurlow gives, substantially, the same reasons for affirming the decision, to wit: the apparent intention of the testatrix.

The case of *Noel v. Lord Henley*¹ was substantially as follows: Lord Wentworth devised certain estates to trustees to sell, and out of the produce to pay, amongst other sums, the sum of £5,000 to his wife, and after those purposes he directed the trus-

¹ Dan., 211, 322.

tees to invest the residue upon certain trusts. His wife afterwards died, in the lifetime of the testator. One of the questions was, whether the £5,000 devolved upon the heir at law, the next of kin, or whether it belonged to the persons entitled to the residue. Richards, C. B., held that by the lapse the residuary legatees were entitled. The case went to the House of Lords on appeal, and was there affirmed. Lord Redesdale said: "If any property is given by a will in the nature of a legacy to a person in being at the time of making the will, but who dies before the testator, that legacy of course becomes lapsed, and no longer payable. That is a contingency to which every person who makes a will must be deemed to know that such a disposition is subject; and, although it is contended on the part of the heirs at law, that this £5,000, arising out of the sale of the real estate should be applied to their benefit as so much *real estate* undisposed of by the will, I conceive that such is not a true construction of the will; because, having given £5,000 as a legacy, which in its nature must be subject to that species of contingency, that contingency is one which he must be supposed to have looked to for the benefit of those persons to whom he gave the residue of the money arising from the sale of the estate; and therefore it seems to me, the decree is perfectly right in the manner in which it has disposed of that question," &c.

The facts in this case were such as to satisfy the court that the testator intended to convert his real estate into money for certain purposes; and after

fulfilling those purposes, that the residue should go, in trust, for certain purposes. The estate taking this direction, the heir at law would be excluded; and, hence, here is evidence that the testator intended to exclude the heir. That the contingency, the death of the wife during the lifetime of the testator, was an incident to such disposition, of which the testator must be presumed to have knowledge, and therefore to have contemplated, when he made residuary legatees. The residuary legatees were to have the residuum as *money*, and not as *real estate*; the £5,000 was money and not *real estate* in the contemplation of the testator; therefore it should go to the residuary legatees in accordance with the manifest intention of the testator.

Each of the foregoing class of decisions are based upon the supposed *intention* of the testator, as gathered from the language of the will; and from each of those decisions may be gathered this principle: that if it clearly appear from the will that the testator intended to convert the *realty* into *personalty*, for lawful purposes, and to make a valid disposition of that personalty, the heir will be excluded. That if there be residuary legatees to whom all the estate is to go after satisfying those legitimate purposes designated by the testator, the next of kin will be excluded. If the residuary legacies fail in the whole or in part, then the estate will go to the heir, or next of kin, according to the nature of the estate.

In the case of *Jackson v. Hurlock*, the testator had devised lands to B. and her heirs, charged with

the payment of any sum, not exceeding £10,000, to such persons as he by any writing should appoint. The testator by writing charged on the estate *inter alia* sums amounting to about £6,000, to charitable uses. This being void, the question was to whom the £6,000 should go. Owing to the illegal character of the disposition, there could be no constructive conversion, hence, it could not go to the next of kin. It was the apparent intention from the will to confer the estate beneficially upon B. and her heirs, thus charged; hence the heir was excluded in the mind of the testator. Then it only remained to sink into the estate for the benefit of B., and so the court held.¹ Where the estate is devised, charged with legacies which fail, either from being void or from lapse, it appears that the testator designed to give to the devisee the beneficial interest of the estate thus charged, the failing disposition will sink into the estate for the benefit of the specific devisee, and will not go to the residuary.²

8. RESULTING TRUSTS ARISING FROM THE EQUITABLE CONVERSION OF PROPERTY.

By an equitable conversion of property is meant an *implied* or *constructive change* of property from *real* to *personal*, or from *personal* to *real*, so that each is considered transferable, transmissible and descend-

¹ Ambl., 487; S. C., 2 Ed., 263; see also *Barrington v. Hereford*, 1 Bro. C. C., 61, n; S. C. 3 Dow., 212, and 4 Ves., 811; *Baker v. Hall*, 12 Ves., 497.

² *Barrington v. Hereford* and *Baker v. Hall*, *ut supra*.

ible, according to its new character, as it arises out of the contracts or other acts and intentions of the parties. This doctrine of equitable conversion is a mere consequence of the common doctrine of courts of equity, that where things which are lawful and proper to be done, and are agreed to be done, they are to be treated for many purposes, as though they were actually done.¹

Where a contract is made for the sale of real estate, the vendor, in equity, becomes immediately, a trustee for the vendee, of the real estate, and the vendee becomes a trustee of the vendor of the purchase money. Therefore, there is an implied or constructive change of the *realty* into *personalty*, and of the *personalty* into the *realty*; so that the vendee is treated as the owner of the land; and the money due or to become due, is treated as the *personal* estate of the vendor, and in equity each are treated according to the new character given. Thus, the purchaser may devise it as land, even before the legal conveyance is made, and it passes by descent to his heir,² and the vendor stands seised of it for the benefit of the purchaser and the trust attaches to the land, so that the heir of the purchaser may insist upon a specific performance of the contract.³

As a general rule, Courts of Equity will not inter-

¹ Story's Eq., sec. 1212, and authorities cited in note 1; also see Story's Eq., sec. 792; *Fletcher v. Ashburner*, 1 Bro. C. C., 499; *Wheledale v. Partridge*, 5 Ves., 396.

² Story's Eq., sec. 790, 1212; *Seton v. Slade*, 7 Ves., 264, 274; *Craig v. Leslie*, 3 Wheat. R., 577; *Beverly v. Peter*, 10 Peters R., 532; see Story's Eq., sec. 1212, note 3, and authorities.

³ *Seaman v. Van Rensselaer*, 10 Barb., 86; Story's Eq., sec. 790.

fere to change the quality of the property left by the testator, vendor, etc., unless there is some clear act, or manifest intention of the testator or vendor, by which the character of *money* or *land* is unequivocally fixed upon the property throughout. For the court knows no equity between the heir and next of kin; and therefore makes no constructive conversion in favor of either. Therefore to establish a conversion, the will or the instrument must direct it absolutely, *out and out for all purposes*, irrespective of all discretion of others, or contingencies.¹

This doctrine of equitable conversion applies to cases where the ultimate destination of the property is to be reached through several gradations. Thus where land is directed to be sold, and the proceeds arising therefrom, to be invested in lands, it will be regarded as real estate, though neither conversion has been actually effected.² But if the *first* conversion is *out and out*, and the *second* is qualified or contingent, the property will be impressed with the character which the *first conversion* stamps upon it. Thus, where land was conveyed to trustees to be sold, and the produce thereof, with the consent of certain persons, was to be laid out in the purchase of land or government securities, the first conversion stamped upon it the character of personalty.³

¹ Wright v. Trustees Method. Ep. Ch., 1 Hoff., 203; Clay v. Hart, 7 Dana, 11; Evans v. Kingsbury, 2 Rand., 120; 1 Jarm. Wills, Perkins' notes, 473, and authorities cited, note 1.

² Sperling v. Toll, 1 Ves. Sr., 70; Pearson v. Lane, 17 Ves., 101.

³ Van v. Barnet, 19 Ves., 102.

Property taken under a *will* or *settlement* directing its conversion, must be taken in the character which such instrument has impressed upon it, and in its subsequent management and disposition it will be governed by rules applicable to property of such a character; for it is a plain dictate of justice and good sense, that the condition of the property should not be affected prejudicially, to those beneficially interested, by the acts of those through whose instrumentality the conversion is to be effected, and in whom no such discretion is reposed.¹

But where the instrument directs the land to be sold, and the proceeds arising therefrom to be invested in real estate within a reasonable time, or as soon as a profitable investment can be made, and that in the meantime the money shall be placed at interest on good security, the temporary arrangement does not prevent the money retaining the character of real estate, because it does not disprove that such was the intention of the testator.²

If the direction in the will is not imperative, requiring the executor or trustee absolutely to convert the property, or ultimately to cause it to be converted, it does not show such an intention on the part of the testator as will convert the property. Therefore, where the instrument contains a mere power to sell or purchase, it does not change the nature of the property; yet the mere circumstance, that the language of the clause respecting the sale

¹ See Jarm. on Wills, 474, note and authorities cited by Perkins; 2 Keb., 841; 2 Vern., 20, 55, 58; 1 Vern., 345, &c.

² See *Edwards v. Countess of Warwick*, 2 P. Wm., 171.

or purchase is framed as though it were a power, will not prevent a constructive conversion if the context of the will show that it is intended to be imperative, or in the nature of a trust.¹

In these, as in other cases, the lawful intention of the testator, so far as it can be ascertained, governs; and the presumption is that the testator does not intend the *nature* of the property to depend upon the option of the person through whom the conversion is to be effected. But if it appears from the will to have been the testator's intention to give to such person an absolute discretion, no constructive conversion will take place: and as between the heir and personal representatives of those beneficially entitled, the property will devolve according to its *actual* character.² Thus, a testatrix devised the residue of her real and personal estate to W., his heirs, executors and administrators, according to the different qualities thereof, upon trust, to retain and keep the same in the state it should be in at the time of her decease, as long as he should think proper, or to sell or dispose of the whole or such part thereof as, and when, he or they should, from time to time, think expedient, and then, upon trust, to invest the proceeds. The testator then directed that W., his heirs, executors or administrators, should stand possessed of all such the general residue of her real and personal estate, and, after the sale of such securities whereon the same should

¹ *Grievson v. Kirsopp*, 2 Keen, 653.

² *Polley v. Seymour*, 2 You. & Coll., 708.

have been invested, in trust, out of the rents and profits, interest, dividends and proceeds, to pay several life annuities; and after the payment thereof, the testatrix directed W., his heirs, executors and administrators, to stand possessed of all the said residue of her said real and personal estate, and of the stocks, funds and securities whereon the same, or any part thereof, should have been invested, and the rents and profits, interest, dividends and produce thereof, in trust, for five persons, (including W. himself,) in equal shares, and for their respective heirs, executors, administrators and assigns, according to the different qualities thereof." In this case it was held that upon the terms of the will, it was not the intention of the testatrix that the property should be converted *out and out*, but that W. had a discretion to sell the whole or any part of it when and as he might think expedient, and that until he executed that discretion the property must be considered as remaining in the state it was at the time of the death of the testatrix.¹

Thus, where it is the manifest intention of the testator to convert land into money, or money into land, that intention prevails, and impresses its character upon the property, and for such purposes the money becomes land, and the land becomes money, by constructive conversion, and whoever becomes the instrument of such conversion will become a trustee for the purposes specified. Thus, where money is devised to be laid out in land to be settled

¹ Jarm. on Wills, Perkins' notes, 478.

on an heir, the executor is a trustee for such purpose, and the money is treated as real estate, or if real estate be charged with the payment of debts, so far as may be necessary for that purpose, it will be treated as converted into personal estate. But it will be considered as thus converted only to the extent necessary for the purposes specified, unless the testator has signified it to be his intention that it shall be converted *out and out*.¹ But if no such intention be signified, it will retain its character as real estate so far as the charge does not extend, until actually converted.¹

Difficulty sometimes arises where the circumstances evincing the intention of the testator do not amount to absolute certainty, and yet seem to indicate a particular intention. Thus, where a testatrix devised real estate, and afterwards sold it, and the purchase was not completed until after her death; the question arose as to whom the purchase money belonged, to the devisee, or to her personal representatives. It was held that it belonged to the personal representatives.² Lord Langdale said "The question whether the devisees can have any interest in that part of the purchase money which was unpaid depends upon the rights and interests of the testatrix at the time of her death. She had contracted to sell her beneficial interest. In equity she had alienated the land, and instead of her beneficial interest therein, she had acquired a title to

¹ Bourn v. Bourn, 2 Hare R., 35, 38; Story's Eq., sec. 1213 (a).

² Fanar v. Earl of Winterton, 5 Beavan R., 1, 8.

the purchase money. What was really hers in right and in equity was not the land, but the money, of which alone she had a right to dispose ; and though she had a lien upon the land and might have refused to convey until the money was paid, yet that lien was a mere security, in or to which she had no right or interest, except for the purpose of enabling her to obtain the payment of the money. The beneficial interest in the land which she had devised was not at her disposition, but was, by her act, wholly vested in another, at the time of her death.”¹

It is well settled that equity will never raise a trust in fraud of the laws of the land. The law will never cast the legal or equitable estate upon a person who by law has no right to hold it. But a Court of Equity will not permit this principle to operate to the prejudice of an alien, when the purchase of real estate for his benefit is made as a means of collecting a debt due to him, without his knowledge, and with no view of defeating the policy of the law. Thus, where land is taken in payment of a debt due to an alien, and conveyed to a trustee upon a valid trust to sell the same and convert it into personal estate, without any unreasonable delay, for the benefit of the *cestui que trust*, a Court of Equity, upon the principle of equitable conversion, will consider the land as personal estate belonging to the alien, and transmissible to his personal representatives as such, and if necessary will com-

¹ See preceding note.

pel the trustee holding the legal estate to sell the land and convert it into money.¹ So also where an attorney was employed to collect a partnership debt, due to a firm the members of which were aliens; but, on account of the alienage of the creditors, and without any directions from them, took the conveyance in his own name to enable him to sell the land and convert it into money, and wrote to them informing them of what he had done, and promising to sell the land for them as soon as purchasers could be found, but died before any sale of the land had been made, and his heirs, after his death, sold the land supposing it to be their own; it was held that the proceeds of such sale, in the hands of the heirs, were personal property belonging to the copartnership firm, and that the personal representatives of the last surviving partner were entitled to recover such proceeds as a part of the copartnership effects.²

But where a new character may have been impressed upon property by means of a trust or of an equitable conversion, that constructive quality is liable to be determined by the acts of those who may be beneficially interested; as at any time before the actual conversion, they may elect to take the property in its actual state.³ Or, through laches, one may loose his right to specific performance.⁴

¹ Willard's Eq., 601, *Anstice v. Brown*, 6 Paige, 448.

² *Craig v. Leslie*, 3 Wheat., 563; also Willard's Eq., 601.

³ *Smith v. Starr*, 3 Whart., 62.

⁴ *Curre v. Bowyer*, 5 Beavan R., 6; *Moor v. Rainsbeck*, 12 Simons, 139.

9. IMPLIED TRUSTS AS LIENS.

There is another class of implied trusts arising from equitable liens, as distinguished from those liens of which the law takes notice. A lien, in its technical sense, is not a property in the thing itself, and consequently it does not constitute a right of action for the thing. In the language of the law it is neither a *jus in re* or a *jus ad rem*. It is rather a charge upon the thing. At law, a lien is deemed to be a right to possess the thing, or to retain it until some charge upon it is paid or otherwise removed. In respect to personal property, a lien, at law, is recognized to exist only when it is connected with the possession or the right to possess, the thing itself. Where, therefore, the possession is voluntarily parted with, at law, the lien is ordinarily gone. At law these liens arise in one of three ways: 1. By express agreement of the parties; 2, by the usages of trade or implied agreement, and 3, by the mere operation of law.

Those liens which are made the basis of implied trusts, generally, are those which exist wholly independent of the possession of the property to which they are attached as a charge, or an incumbrance, and can be enforced only in equity.¹ The usual mode of enforcing such lien, if not otherwise discharged, is by sale of the property to which it is attached.

It is a doctrine of Courts of Equity that the

¹ Story's Eq., sec. 1058.

vendor of real estate has a lien upon the land for the amount of the purchase money. That this lien is good against the vendee and his heirs, and other privies in estate, and against all subsequent purchasers with notice of non-payment of purchase money, and, to the extent of this lien, the vendee becomes a trustee for the vendor and his heirs; and all persons claiming under the vendee, with notice, also become trustees to the same extent.¹ The lien of the vendor attaches to the estate as a trust, whether it be actually conveyed, or be only contracted to be conveyed.²

Courts of Equity have established this lien, in the nature of a trust, upon the principle, that as between the parties, privies, and others charged with knowledge, it is against good conscience for one who has gotten the estate of another to keep it without paying the full consideration money.³ And although this trust may stand upon the supposed tacit agreement between the parties, yet it also stands independently of any such supposed agreement.⁴ It has been objected that the creation of this trust by Courts of Equity is in contravention of the Statute of Frauds. But equity proceeds upon the hypothesis that the trust being raised by impli-

¹ Story's Eq., sec. 1217; 4 Kent, sec. 58, p. 152; *McLearn v. McLellan*, 10 Peters, 625, 640.

² Sugden on Vendors, chap. 12, p. 541, 7th ed.; *Smith v. Hubbard*, 2 Dick. R., 730; *McLearn v. McLellan*, *ut supra*; *Dodsley v. Varley*, 12 Adolph. & Ellis, 632, 633.

³ See *Macreth v. Symmons*, 15 Ves. R., 340, 347, 349.

⁴ *Nairn v. Prowse*, 6 Ves., 752; *Chapman v. Tanner*, 1 Vern. R., 267; also Story's Eq., sec. 1220.

cation, is not within the meaning of the statute, but is excepted therefrom.¹

This lien, raising a trust for the purchase money, will of course be discharged when the purchase money is paid, or where anything is received in full satisfaction therefor. It may all be summed up in this: where the circumstances show that the vendor has consented to look for his payment to other securities than the land, and had ceased to look to the land for security, the lien and consequent trust will be discharged. By the Civil Law, the lien was discharged when the purchase money was paid; where anything was taken in satisfaction of the price, although payment had not been positively made, and, where a personal credit was given to the vendee excluding any notion of lien.² Our courts have adopted the same principle.

There has been much difficulty in cases arising under this principle, in deciding whether, from the circumstances, the vendor intended to part with the lien. The difficulty has not arisen from a doubt as to the principle, but from the uncertainty of its proper application. The lien of the vendor exists unless discharged; for the presumption is in favor of the lien; and the *onus probandi* is with the purchaser. The point to be made out is, that the vendor has intentionally waived his lien; and if, under all the circumstances, it remains doubtful, the lien still exists. The difficulty lies in deter-

¹ Coote on Mortg., 227; *Macreth v. Symmons*, 15 Ves., 439.

² Story's Eq., sec. 1223.

mining what circumstances shall be deemed sufficient to evince such an intention.¹ Each case must be determined upon the evidence which it brings; for there can be no anticipating the ten thousand combinations and modifications of circumstances by which such an intention may be indicated or rebutted. The simple and universal rule is this: when all the facts and circumstances taken together, satisfy the court that the parties intended to waive the lien, it will be discharged; when that intention is not clearly made out, it will not be displaced.

There is ever to be kept in mind, a distinction between a *fact* to be established, and the *evidence* by which that fact is to be made out. Thus, if upon the face of the conveyance, the consideration is expressed to be paid, or even if a receipt therefor is endorsed upon the back of the instrument, yet, if in point of fact, the consideration has not been paid, the lien still attaches.² So also taking security for the purchase money, is not necessarily a discharge of the lien; it is only presumptive evidence of an intention on the part of the vendor to waive it,³ and even where security has been taken for the purchase money, it has been held that the burden of proof is still upon the vendee to show that the vendor agreed to rest on that security.⁴ After all the

¹ Story's Eq., sec. 1224.

² Maereth v. Symmons, 15 Ves., 337 to 350; Hughes v. Kearney, 1 Sch. & Lefr., 135; Winter v. Anson, 3 Russ., 488; S. C. 1 Sim. & Stu., 434; Story's Eq., sec. 1225.

³ See Mackreth v. Symmons, *ut supra*.

⁴ Hughes v. Kearney, 1 Sch. & Lefr., 135; but see Bradford v. Marvin, 2 Florida, 463.

decisions, the question is still one of *intent* on the part of the parties—and the difficulty has been, what shall be deemed conclusive evidence of an intention to waive the lien.¹

This lien, and consequent trust, extends to the personal representatives of the vendor, and may be enforced by marshalling assets in favor of legatees, creditors, etc., giving them the benefit by way of substitution;² also if a subsequent incumbrancer, or purchaser of the vendee, is compelled to discharge the lien of the vendor, he is substituted in his place, as against other claimants, under the vendor.³ The lien will also prevail against assignees claiming under an assignment under the bankrupt and insolvent laws;³ and against assignees claiming under a general assignment, made by a failing debtor for the benefit of his creditors,⁴ also against a judgment creditor of the vendee.⁵ Where there is a particular assignment to particular or specified creditors for their particular security or satisfaction, the lien will not prevail as against such, for they are deemed

¹ See remarks of Sir Wm. Grant in case of *Nairn v. Bowse*, 6 Ves., 752, found in note to sec. 1226. Story's Eq., 7th ed.; also Lord Eldon, in case of *Maereth v. Symmons*, 15 Ves., 342, same note.

² Story's Eq., sec. 788, and authorities, also sec. 1227, notes and authorities.

³ *Blackburn v. Gregson*, 1 Bro. Ch. R., 420, by Best; Sng. on Ven., chap. 12, sec. 3, page 557; *Mitford v. Mitford*, 9 Ves., 100; *Grant v. Miller*, 2 Ves. & Beam., 306, &c.; *Chapman v. Tanner*, 1 Vern., 267; *ex parte Peake*, 1 Mad. R., 356.

⁴ *Farewell v. Heelis*, Ambl. R., 726; Sng. on Vend., chap. 12, sec. 3, page 558, 7th ed.; *Bayley v. Greenleaf*, 7 Wheat. R., 54, 55; *Green v. Demoss*, 10 Humph., 371.

⁵ *Finch v. Earl of W.*, 1 P. Wm., 278; 4 Kent's Com., sec. 58, page 154, 2d ed.

to have the same equities as *bona fide* purchasers, without notice. This only applies to cases of *actual* assignment, without notice.¹

Where an estate is sold upon which there is an incumbrance, and a deposit of money is made with a third person to be applied in discharge of such incumbrance, a lien in favor of the vendee is created upon such money. Thus, where it was agreed, on the sale of an estate, that the purchase money should be deposited in the hands of a third person to be applied in discharge of prior incumbrances, it was held that a lien in favor of the vendee was created upon such purchase money to the extent of such prior incumbrances, and consequently the third person became trustee of the vendee to such an extent.²

Liens in the nature of trusts may be established both upon real and personal estate, or upon money in the hands of a third party, wherever it becomes a matter of agreement between the parties, that the same shall be established. These liens are valid as against the parties themselves, volunteers, and all who have notice, because such an agreement, in equity, raises a trust. Thus, where a tenant for life of real estate agreed by covenant to set apart and pay the whole or a portion of the annual profits to trustees for certain objects, this covenant

¹ *Mitford v. Mitford*, 9 Ves., 100; *Bayley v. Greenleaf*, 7 Wheat., 56, 57.

² *Farr v. Middleton*, Prec. Ch., 174, 175; *Collyer v. Fallon*, 1 Turn. & Russ., 469, 475, 476; *Leggard v. Hodges*, 1 Ves. Jr., 478; see *Story's Eq.*, sec. 1039 to 1058.

created a lien on those profits against him, in the nature of a trust.¹

This lien is continued, upon the estate or upon the purchase money remaining unpaid, where the vendee has sold the lands to a *bona fide* purchaser without notice. In such cases, so far as the purchase money remains unpaid, the purchaser takes the estate, *cum onere*, and becomes trustee for the original vendor or for those legally and equitably representing him; and he may proceed against the estate for his lien, or against the purchase money in the hands of the purchaser.²

Where there is a lien upon different parcels of land for the payment of the same debt, and some of those lands still belong to the person, who, in equity and justice owes it and is bound to pay it, while other parts of the land have been transferred by him to others; as between himself and such third persons, his part of the land shall be first charged with the debt. In this way, the lien which covered all the parcels of land now attaches to that particular parcel owned by the equitable debtor, and it must be first subjected to the payment of the lien, and will be held in trust for such purpose.³

¹ *Leggard v. Hodges*, 4 Ves. Jr., 478; see *Roundell v. Breary*, 2 Vern. R., 482; *Power v. Bailey*, 1 Ball & Beatt., 49; *Gardner v. Townshend*, Coop. Eq. R., 303; *Wellesley v. Wellesley*, 4 Mylne & Craig, 561; *Lewis v. Maddock*, 17 Ves., 48.*

² Story's Eq., sec. 1232; *Lench v. Lench*, 10 Ves., 511; *ex parte Morgan*, 12 Ves., 6; see Story's Eq., sec. 1255, 1262.

³ Story's Eq., sec. 1233, and authorities there cited.

10. IMPLIED TRUSTS ARISING FROM THE RIGHT OF
EQUITABLE CONTRIBUTION.

This trust, as the result of a lien, arises where there is a joint ownership of real or other property, and necessary repairs and improvements are made upon it by one of the owners, for their joint benefit. This lien arises from a contract, express or implied. It is sometimes created by Courts of Equity upon principles of general justice, where equity and good conscience require that the party demanding justice shall first do justice. As where the one who is seeking relief ought to pay his proportion of the money expended in the repairs and improvements of that property which he seeks to enjoy. The equitable maxim, *Nemo debet locupletari ex alterius incommodo*, applies in such cases. Thus, where two or more persons make a joint purchase, and afterwards one of them expends a considerable sum of money in repairs and improvements and dies. The money thus expended will be a lien upon the estate, and a trust will thus arise for the benefit of the representatives of him who advanced it.¹ This doctrine extends to all cases where the party making the improvements, repairs, etc., has acted in good faith, and has conferred a substantial benefit upon the owner, so that, *ex aequo et bono*, and good conscience he ought to pay for such benefits. Thus, where a tenant for life, under a will, has finished

¹ *Lake v. Craddock*, 1 Eq. Abr., 291; S. C. 3 P. W. 158; 2 Fonbl. Eq., B. 2, chap. 4, sec. 2, note (g); Sugd. on Vend., chap. 15, sec. 1, page 637, 7th ed.

improvements commenced by the testator, which are permanently beneficial to the estate, he has a lien for such expenditure. So, where a party, lawfully in possession under a defective title, has made permanent improvements, and the true owner is asking relief in equity, he will be required to pay for such improvements. So, where one joint owner has in good faith expended money in improving the estate, and the other seeks a partition, he will be required to reimburse before he can have partition.¹

Upon a similar principle, where the true owner of an estate stands by and permits improvements to be made thereon, without giving notice of his title, in equity he will not be permitted to enrich himself by another's loss; but before he can enjoy the benefits of such improvements he shall pay for them.² This same principle is applicable to cases where the parties stand in a *fiduciary* relation to each other, as where an agent stands by and permits his principal to expend money in improvements upon his own estate, without giving notice.³

Sureties are entitled to a contribution from each other for moneys paid in discharge of their joint liabilities for their principal. Therefore where one

¹ See Sugd. on Vend., chap. 26, sec. 10, page 720; *Hibbert v. Cooke*, 1 Sim. & Stu., 552; *Robinson v. Bidley*, 6 Madd. R., 2; see *Att'y Gen. v. Balliol College*, 9 Mod. R., 411; *Bright v. Boyd*, 1 Story R., 478; see *Story's Eq.*, sec. 1237, and note citing the case of *Bright v. Boyd*; *Swan v. Swan*, 8 Price, 518.

² *Green v. Biddle*, 8 Wheat. R., 1, 77, 78; *Shine v. Gough*, 1 B. & Beatt., 444; *Cawdor v. Lewis*, 1 You. & Coll., 427; see *Bright v. Boyd*, *ut supra*.

³ *Lord Cawdor v. Lewis*, *ut supra*.

of the sureties has taken, for his own indemnity, other securities from the principal, equity will extend the benefit of such securities to all the sureties.¹ Where a surety has paid the debt of his principal to the creditor, in equity he is to have the benefit of all the collateral securities, both of a legal and equitable nature, which his principal has deposited with the creditor as an additional pledge for his debt.² Thus, where, at the time the bond of the principal and sureties is given, a mortgage also is made by the principal to the creditor, as an additional security for the debt; there, if the surety pays the debt, he will be entitled to have an assignment of that mortgage, and thus to stand in the place of the mortgagee.³ For it is a rule in equity, that a surety paying off the debt of his principal, shall stand in the place of the creditor, and have all the rights which he has for the purpose of reimbursement.⁴

So also in equity, a creditor of an estate may recover his debt from the legatees and distributees, who have received payment of their claims from the executor before the debts were paid. In such

¹ Theobald on Prin. and Surety, chap. 11, sec. 283; *Swan v. Wall*, 1 Ch. Rep., 149; *Steale v. Mealing*, 24 Alab., 285.

² *Craythorn v. Swinburne*, 14 Ves., 159; *Wright v. Morley*, 11 Ves., 12, 22; *Copis v. Middleton*, 1 Turn. & Russ. R., 224; *Jones v. Davis*, 4 Russ. R., 277; *Story's Eq.*, sec. 499, and authorities cited.

³ See *Lond v. Sargeant*, 1 Edw. Ch. R., 164; *Marsh v. Pike*, 1 Sandf., 211; *McLean v. Towle*, 3 Sandf., 117, 136, 161; *Bank v. Campbell*, 2 Rich. Eq. R., 180; *Atwood v. Vincent*, 17 Conn., 576; *Wheatley v. Calhoon*, 12 Leigh, 265.

⁴ See *Hodgson v. Shaw*, 3 Mylne & Keen, 190, &c.; *Story's Eq.*, 421 (a), and 499, and authorities.

cases, the executor, who, acting under a mistake, and in good faith, has paid the legacies, supposing the debts to be paid, is liable to the creditor in an action at law. But equity raises a trust, and follows the assets of the testator into the hands of the legatees and distributees, and converts them into trustees for such creditors.¹

11. IMPLIED TRUSTS ARISING WHERE PROPERTY IS BEQUEATHED OR DEVISED SUBJECT TO A CHARGE FOR PAYING DEBTS OR LEGACIES, ETC.

There is a distinction to be made between cases where the property is given, in trust, for the payment of debts, legacies, etc., and those cases where the property given is made subject to the charge for the payment of debts, etc. In the former case the trustee has no beneficial interest in the property; but, after paying the debts, etc., he holds the residue, in trust, for the heir at law or next of kin, according to the character of the property. In the latter case, the donee has the beneficial interest, subject to the payment of such debts, etc., as are by the will charged upon the estate. And he holds the estate to the extent of the debts charged thereon as trustee for the creditors.² As between the immediate parties to the original instrument, the trust is an express one. Yet between the trustee and the

¹ *Riddle v. Mandaville*, 5 Cranch R., 329; *Newman v. Barton*, 2 Vern., 205; *Noel v. Robinson*, 1 Vern., 94; *Story's Eq.*, sec. 1251. 90, 92.

² *Story's Eq.*, sec. 1245; *King v. Denison*, 1 Ves. & Beam., 273; *Hill v. B. of London*, 1 Atk. R., 620; *Craig v. Leslie*, 3 Wheat. R., 582.

cestui que trust, the trust is an implied one, and belongs rather to *constructive* trusts than *resulting* ones, and will be considered more fully under that head.¹

Charges of this kind are usually made or created by express and positive declarations in the deed or will; but sometimes they arise by implication, from the use of certain expressions, indicating an intention to charge the estate. Such words as the following: "after paying my debts," "after the payment of all just debts," or "my debts being first paid," or "I direct that all my debts shall be paid," are not unfrequently used in connection with language making a full disposition of the whole estate. The question often arises whether the debts are to be treated as a charge upon the real estate. It is now the settled doctrine that they are to be so considered; and the testator is deemed to have intended to perform an act of justice, before he does one of generosity.² In all such cases, the devisee becomes trustee for the creditors, and each may enforce the trust.

In all these cases the intention of the testator, as it can be gathered from the language of the will, is to prevail; therefore, where, from the language and circumstances, it can be properly inferred that the testator did not intend to charge his real estate with the payment of his debts, Courts of Equity will hold accordingly. Thus, where a testator has direc-

¹ Story's Eq., sec. 1244.

² *Thomas v. Britnell*, 2 Ves., 314; 2 *Powell on Devises*, by Jarmin, chap. 34, p. 653; *Price v. North*, 1 Phill. Ch. R., 83; Story's Eq., sec. 1246.

ted, in general terms, that his debts shall be paid, and has afterwards pointed out a particular fund which he wishes to have applied for that purpose, that is very properly construed to exclude the intention of appropriating a more general fund.¹ The same lack of intention is also inferred, where the testator directs his executor to pay his debts, and devises no lands to them. For had he intended the executor to pay his debts from the sale of his realty, he would have devised lands to him for such purpose. The maxim is "*Expressio unius est exclusio alterius.*" Therefore, where the testator directs a particular person to pay, it is presumed in the absence of other evidence, that he intends him to pay out of the funds with which he is entrusted, rather than out of those over which he has no control.² So, likewise, where the executor is pointed out as the one to pay debts, legacies, etc., that excludes the presumption that other persons, not named, are to pay them.³

This subject will be fully considered in a subsequent chapter on trusts raised for the payment of debts.

¹ Thomas v. Britnell, 2 Ves., 313; 2 Jarm. Pow. on Dev., chap. 34, pp. 653, 654; Graves v. Graves, 8 Sim. R., 43; Price v. North, 1 Phill. Ch. R., 83.

² Story's Eq., sec. 1247, and authorities; see Brydges v. Landen, cited 3 Ves. Jr., 550; Keeling v. Brown, 5 Ves., 359; Powell v. Robins, 7 Ves., 209; Wilan v. Lancaster, 3 Russ. R., 108, &c.

³ Story's Eq., sec. 1247, see authorities quoted; Knightley v. Knightley, 2 Ves. Jr., 328; Chitty v. Williams, 3 Ves., 551; Keeling v. Brown, 5 Ves., 361.

12. A RESULTING TRUST ARISING IN CASES OF JOINT PURCHASES AND PURCHASES WITH PARTNERSHIP PROPERTY.

At law, where two persons advance and pay the purchase money in equal proportions, and take a conveyance to themselves and their heirs, they are considered joint tenants, having jointly purchased the chance of survivorship, that is, the right of the survivor to take the whole estate. Equity does not favor these kind of estates, therefore, when circumstances occur that may be construed into a contrary intent, the court will lay hold of them, and, if possible, prevent a survivorship and create a trust.¹ Thus, if a joint purchase is made in the name of one of the purchasers, and the other pays or secures his share of the purchase money, he will be entitled to his share as a *resulting trust*;² or if two persons advance money by way of a loan, and take a mortgage jointly, and one of them die, the survivor shall not have the whole sum due on the mortgage; but the representatives of the deceased party shall have his proportion as a trust, for, from the nature of the transaction, the presumption of a joint tenancy is rebutted.³ Or where, in the purchase of an estate, two or more persons pay the purchase money in unequal proportions, and take the conveyance in their joint names, this will not be deemed a joint tenancy,

¹ Story's Eq., sec. 1206, and authorities cited.

² Wray v. Steele, 2 Ves. & B., 388.

³ Petty v. Steward, 1 Ch. R., 31; S. C. 1 Eq. Abridge., 290; 2 Fonbl. Eq., B. 2, chap. 4, sec. 4, note (g); Rigdon v. Vallier, 2 Ves., 258; S. C. 3 Atk., 731.

from the circumstance of paying in unequal proportions.¹

Where real estate is purchased with partnership funds, on partnership account, and for partnership purposes, the property will be deemed, by the court, to be partnership property, no matter in whose name the purchase may have been made or the conveyance taken. Let the legal title be vested in whom it may, in equity it belongs to the partnership, and the partners are deemed *cestuis que trust* thereof.² This must be taken subject to the rights of *bona fide* purchasers without notice of its being partnership property. But all persons, taking the legal title with notice that the property was purchased with partnership funds, etc., will be treated as trustees of the members of the partnership to the extent of such property.

In New York, land held by partners is held by them as tenants in common,³ and not as joint tenants. But lands purchased by partners for the use of the firm in its business, will be considered in equity as personal property, and will go to the survivor or survivors for the payment of debts.⁴

¹ Sugd. on Vend., chap. 15, sec. 1, p. 607, note 1, 7th ed.; also same, chap. 15, sec. 1, p. 127, and note, 9th ed.; Story's Eq., sec. 1206, and note; *Lake v. Gibson*, 1 Eq. Abridg., 290; *Rigdon v. Vallier*, 2 Ves. R., 258.

² *Anderson v. Lemon*, 4 Seld., 236.

³ *Coles v. Coles*, 15 Johns., 159; *Buchan v. Sumner*, 2 Barb. Ch., 165; *Smith v. Jackson*, 2 Edw., 28.

⁴ *Delmonico v. Guillaume*, 2 Sandf. Ch., 366; *Smith v. Tarlton*, 2 Barb., 336; *Cox v. McBurney*, 2 Sandf., 561; *Buckley v. Buckley*, 11 Barb., 43.

13. IMPLIED TRUSTS ARISING IN CASE OF EXECUTORS AND OTHERS STANDING IN A FIDUCIARY CAPACITY.

Where the testator, by will, appoints an executor, at the death of the testator the executor is possessed, or entitled to the possession, of all his personal estate, subject to the disposition thereof made by the will; and after paying all debts and charges made thereon, the executor is entitled to the residue for his own personal benefit.¹ This claim of the executor, however, is not favored in equity, and wherever there are any circumstances which tend to rebut the presumption that the testator intended such gift to the executor, the court will give them great consideration, and, if possible, raise a trust for those upon whom, by law, the estate would have been cast. So strong has been the feeling, that generally, in the United States, provision by statute has been made for such surplus, and in the absence of any declared intention to the contrary, it is distributed among the next of kin. But where no such provision exists, then, in the absence of any intention to the contrary expressed in the will, the executor takes the surplus.² But Courts of Equity will lay hold of every circumstance from which to gather a different intention, and convert the executor into a mere trustee.³

¹ Story's Eq., sec. 1208; 2 Mad. Ch. Pr., 83, 85; 2 Fonbl. Eq., B. 2, chap. 2, sec. 5, note (*k*); Jeremy on Eq., B. 1, chap. 1, sec. 2, pp. 122-129.

² Story's Eq., sec. 1208; see N. Y. R. S., vol. II., p. 92, sec. 52; 2 Kent's Com., 420; 3 Johns. Ch. R., 44; Mass. Rev. Stat., 1835.

³ Fonbl. Eq., B. 2, chap. 2, sec. 5, note (*k*).

Fonblanque in his *Equity*¹ has collected most of the decisions upon the subject, from which he deduces the following: "The cases are not easily reconcilable, but the following rules have been observed in the decisions upon this subject. 1. As the exclusion of the executor is to be referred to the presumed intention of the testator that he should not take beneficially, an express declaration that he shall take as a trustee, will of course exclude him;² and the exclusion of one executor as trustee will also exclude his co-executor,³ unless there is evidence of the contrary intention:⁴ and a direction that the executor shall be reimbursed for his expenses, is evidence sufficient to establish his character as trustee.⁵ 2. Where the testator appears to have intended by his will to make an express disposition of the residue, but, by some accident or omission, such disposition is not perfected at the time of his death, as where the will contains a residuary clause, but the name of the residuary legatee is not inserted, the executor shall be excluded from the residue.⁶ 3. Where the testator has by his will disposed of the residue of his property, but by the death of the residuary legatee in

¹ See preceding note.

² *Pring v. Pring*, 2 Vern., 99; *Graydon v. Hicks*, 2 Atk., 18; *Wheeler v. Sheers*, Mosely, 288, 301; *Dean v. Dalton*, 2 Bro. Ch. R., 634; *Bennet v. Bachelor*, 3 Bro. Ch. R., 28.

³ *White v. Evans*, 4 Ves., 21.

⁴ *Williams v. Jones*, 10 Ves., 77; *Pratt v. Sladdon*, 14 Ves., 193; *Dawson v. Clark*, 15 Ves., 416.

⁵ *Dalton v. Dean*, 2 Bro. R., 634.

⁶ *Bp. of Cloyne v. Young*, 2 Ves., 91; *Lord North v. Pardon*, 2 Ves., 495; *Hornsby v. Finch*, 2 Ves. Jr., 78; *Oldham v. Carlton*, 2 Cox R., 400.

the lifetime of the testator, it is undisposed of at the time of the testator's death.¹ 4. Where the testator has given him a legacy expressly for his care and trouble, which, as observed by Lord Hardwick in *Bishop of Cloyne v. Young*, 2 Ves. 97, is a very strong case for a resulting trust, not on the foot of giving all and some, but that it was evidence that the testator meant him as trustee for some other, for whom the care and trouble should be, as it could not be for himself²

“5. Though the objection to the executor's taking part and all has been thought a very weak and insufficient ground for excluding him from the residue, as the testator might have intended the particular legacy to him in case of the personal estate falling short, yet it has been allowed to prevail; and it is now a settled rule in equity that if a sole executor has a legacy generally and absolutely given him, he shall be excluded from the residue.³ Nor will the circumstance of the legacy being specific be sufficient to entitle him.⁴ Nor will the testator's having bequeathed legacies to his next of kin vary the rule,⁵ for the rule is founded rather on a presump-

¹ *Nichols v. Crisp*, Amb., 769; *Bennett v. Bachelor*, 3 Brown Ch. R., 28.

² *Foster v. Munt*, 1 Vern., 473; *Rachfield v. Careless*, 2 P. Wm., 157; *Cordel v. Noden*, 2 Vern., 148; *Newstead v. Johnson*, 2 Atk., 46.

³ *Cook v. Walker*, cited 2 Vern., 676; *Joslin v. Brewit*, Bunb., 112; *Danvers v. Dewes*, 3 P. Wm., 40; *Farrington v. Knightly*, 1 P. Wm., 544; *Vachel v. Jeffries*, Prec. Ch., 170; *Petit v. Smith*, 1 P. Wm., 7.

⁴ *Randall v. Bookey*, 2 Vern., 425; *Southcote v. Watson*, 3 Atk., 229; *Martin v. Rebow*, 1 Bro. Ch. R., 154; *Nesbit v. Murry*, 5 Ves., 149.

⁵ *Bayley v. Powell*, 2 Vern., 361; *Wheeler v. Sheers*, Mosely, 288; *Andrew v. Clark*, 2 Ves., 162; *Kennedy v. Stainsby*, E., 1755, stated in note; 1 Ves. Jr., 66.

tion of intent to exclude the executor, than to create a trust for his next of kin; and therefore if there be no next of kin, a trust shall result for the crown.¹ 6. Where the testator appears to have intended to dispose of any part of his personal estate.² 7. Where the residue is given to the executors as tenants in common, and one of the executors dies, whereby his share lapses, the next of kin, and not the surviving executors, shall have the lapsed share.³ With respect to co-executors, they are clearly within the first three stated grounds, on which a sole executor shall be excluded. And as to the fourth ground of exclusion, it seems to be now settled that a legacy given to one executor, expressly for his care and trouble, will, though no legacy be given to his co-executor, exclude.⁴

“As to the fifth ground of exclusion, of a sole executor, several points of distinction are material in its application to co-executors. A sole executor is excluded from the residue by the bequest of a legacy, because it shall not be supposed that he was intended to take a part and to take all. But if there are two or more executors, a legacy to one is not within such objection; for the testator might intend to him a preference *pro tanto*.⁵ So, where several executors have unequal legacies, whether

¹ Middleton v. Spicer, 1 Bro. Ch. R., 201.

² Urquhart v. King, 7 Ves., 225.

³ Page v. Page, 2 P. Wm., 489; 1 Ves. Jr., 66, 542.

⁴ White v. Evans, 4 Ves., 21.

⁵ Colesworth v. Brangwin, Prec. Ch., 323; Johnson v. Twist, cited 2 Ves., 166; Buffer v. Bradford, 2 Atk., 220.

pecuniary or specific, they shall not thereby be excluded from the residue.¹ But where equal pecuniary legacies are given to two or more executors, a trust shall result for those on whom, in case of intestacy, the law would cast it.² But see, *Heron v. Newton*, 9 Mod., 11 Qu., Whether *distinct, specific* legacies, of equal value, to several executors, will exclude them?"

"It now remains to consider, in what cases an executor shall not be excluded from the residue. Upon which it may be stated as a universal rule, that a Court of Equity will not interfere to the prejudice of the executor's legal right, if such legal right can be reconciled with the intention of the testator, expressed by or to be collected from his will. And, therefore, even a bequest of a legacy to the executor shall not exclude, if such legacy be consistent with the intent that the executor shall take the residue: as, where a gift to the executor is an exception out of another legacy,³ or where the executorship is limited to a particular period, or determinable on a contingency, and the thing bequeathed to the executor upon such contingency taking place, is bequeathed over;⁴ or where the gift is only a limited interest, as for the life of the

¹ *Brasbridge v. Woodroffe*, 2 Atk., 69; *Bowker v. Hunter*, 1 Bro. Ch. R., 328; *Blinkhorn v. Feast*, 2 Ves., 27.

² *Petit v. Smith*, 1 P. Wm., 7; *Carey v. Goodinge*, 3 Bro. Ch. R., 110; *Muckleston v. Brown*, 6 Ves., 64.

³ *Griffeth v. Rodgers*, Prec. Ch., 231; *Newstead v. Johnstone*, 2 Atk., 45; *Southcot v. Watson*, 3 Atk., 229; but see *Darrah v. McNair*, 1 Ashm., 236; *Paup v. Mingo*, 4 Leigh, 163.

⁴ *Hoskins v. Hoskins*, Prec. Ch., 263.

executor,¹ or when the wife is executrix, and the bequest is of her paraphernalia.”²

The principle to be kept in mind is this: “*the intent guides the use*,” and wherever the language and circumstances make clear the intent, to the satisfaction of the court, that, being legal and proper, it is to be followed; but in cases where that cannot be ascertained, then the estate shall go where the law would cast it, as in cases of intestacy. Such will be found to be the principle in all the decisions. The conflict is often apparent and not real; and arises from considering the *particular kind of evidence* by which the intent is proved, as of more importance than the *intent* itself. The same important fact, taken with one set of circumstances, would furnish indubitable proof of an intent, which would not be proved by the same important fact taken with another set of circumstances. Great care should be taken at all times, never to confound the *fact to be proved*, with the *evidence by which it is to be proved*. There is very little conflict of principle in the administration of justice. The conflict is in the application of the principle to the endless variety of cases which are liable to arise.

Under the law, where the testator appoints an executor, that executor, by an act of the law, becomes vested with all the personal estate of which the testator died possessed. As a consequence of

¹ Lady Granville v. Dutchess of Beaufort, 1 P. Wm., 144; Jones v. Westcombe, Prec. Ch., 315; Nourse v. Finch, 1 Ves. Jr., 356.

² Lawson v. Lawson, 7 Bro. P. C., 521; Ball v. Smith, 2 Vern., 675; 3 Wooddes., sec. 59, pp. 495 to 503.

this principle, when the testator appoints his debtor to be his executor, the office, by law, extinguishes the debt, for, by the act of the law, it becomes his.¹ But equity looks deeper, saying, "the intent governs the use," and will not consider the debt as extinguished by the appointment of the debtor as executor; that is, equity does not consider that single fact as sufficiently evincive of an intent on the part of the testator, to forgive the debt, and consequently will treat the debt as though it were due from any third person.²

The rule by which the undisposed residue is applied is laid down thus: "Where there appears a plain implication or strong presumption that the testator, by naming an executor, meant only to give the office of executor and not the beneficial interest, the person named is considered as trustee for the next of kin."³

14. IMPLIED TRUSTS ARISING BY WAY OF SUBSTITUTION.

This kind of trust arises as between the parties, where one takes an estate already charged with the payment of debts, legacies, or other charges, and makes himself personally liable therefor by his own express contract. In such case the original trust attached to the estate, continues, not as a lien merely, but the real estate is treated as the primary fund. The implied trust arises between the creditor

¹ Story's Eq., sec. 1209, and *Hudson v. Hudson*, 1 Atk., 461.

² *Hudson v. Hudson*, *ut supra*; *Phillips v. Phillips*, 1 Ch. Cas., 292; *Brown v. Selwin*, Cas. T. Talbot, 240; Story's Eq., sec. 1209.

³ *Ellcock v. Mapp*, 16 Eng. L. and Eq., 27.

and the party who takes the estate subject to such charge, and also between such party and the heirs, devisees, and distributees, of the debtor, provided such debt be paid out of the personal assets of the debtor's estate.¹

Where a settler upon a marriage settlement created a trust term in his real estate for the raising of portions, and also covenanted to pay the amount of the portions, it was held to be a charge primarily on the real estate, and that the personal estate was auxiliary thereto.¹ It is also laid down as a rule, that between the representatives of the *real* and *personal* estate, the land is the primary fund to pay off the mortgage.² That where the estate descends or comes to one, subject to a mortgage, although the mortgage be afterwards assigned, and the party enter into a covenant to pay the money borrowed, yet that shall not bind his personal estate. That the purchaser of land subject to the payment of a mortgage debt does not make the debt personal, even though additional security be given.³

It is a general rule that a covenant by a settler to convey and settle lands, without specifying the particular lands, will not constitute a specific charge upon his real estate; but at most the covenantee will be deemed a creditor by specialty.⁴ Mr. Fon-

¹ 1 Mad. Ch. Pr., 397; Story's Eq., sec. 574, 1003, 1248; see *Lechmere v. Charlton*, 15 Ves., 197, 198; *McLearn v. McLellan*, 10 Peters' R., 625.

² 3 Johns. Ch. R., 252.

³ 2 Bro., 57; also *Evelyn v. Evelyn*, 2 P. Wm., 659.

⁴ See Sugd. on Vend., chap. 15, sec. 4, p. 633, 7th ed.; *Freemoult v. Dedire*, 1 P. Wm., 429; *Finch v. E. of Winchelsea*, 1 P. Wm., 277; *Williams v. Lucas*, 1 P. Wm., 430, Mr. Cox's note (1).

blanque in his Equity¹ says, that a covenant to settle or to convey particular lands, at law, will not create a lien upon the lands; but in equity, if for a valuable consideration, such a covenant will be deemed a specific lien upon the land, and the court will decree against all, holding under such covenantor, except *bona fide* purchasers without notice.² But a general covenant to settle lands of a certain value, without mentioning any lands in particular, will not create a specific lien on any of the lands of the covenantor.³

In the case of *McLearn v. McLellan*,⁴ Justice McLean laid down the following principles as governing in determining the liability of the *real* or personal estate, for the payment of mortgage debts: "If the contract be personal, although a mortgage be given, the mortgage is considered in aid of the personal contract, and on the decease of the mortgagor, his personal estate will be considered the primary fund, because the contract was personal. But if the estate descend to the grandson of the mortgagor, then the charge would be upon the land, as the debt was not the personal debt of the immediate ancestor. And so, if the contract is in regard to the realty, the debt is a charge on the land. It is in this way that a Court of Chancery, by looking at the origin of the debt, is enabled to fix the rule between the distributees."⁴

¹ B. 1, chap. 5, sec. 7, note (d).

² See *Finch v. Earl of Winchelsea*, 1 P. Wm., 282, and other authorities there quoted by Fonblanque in note 1. *ut supra*.

³ Fonblanque, *ut supra*, note (e).

⁴ 10 Peters' R., 625.

The reason why a general covenant to settle lands, without mentioning any lands in particular, will not become a lien upon the land of the covenantor, is because the court cannot ascertain to what particular lands the covenant was intended to apply, if any in particular were intended. But if by any legal and just means the court can ascertain that the covenant was intended to apply to particular or specific lands, equity will charge such lands. Thus, where a covenantor expressly declared the settlement to have been made in the execution of his power over lands, the court proceeded to ascertain the land from the power.¹ It is upon the principle that that is certain which is capable of being rendered certain. *Id certum est, quod certum reddi potest.*

But Judge Story, in his Equity Jurisprudence² says, "That in some cases Courts of Equity have established liens upon real property, by what has been called a very subtle equity, where perhaps it would be difficult to maintain it in ordinary cases. Thus, where a man before marriage, gave a bond to convey sufficient freehold or copyhold estates to raise £600 per annum, for his intended wife in bar of her dower; and the intended wife, by a memorandum subscribed to the bond, declared her free acceptance of the jointure in bar and satisfaction of dower, and the marriage took effect, and the husband died without having conveyed any such es-

¹ See *Coventry v. Coventry*, 2 P. Wm., 222.

² Sec. 1249 quotes *Foster v. Foster*, 3 Bro. Ch. R., 489; S. C., under name *Tew v. E. of Winterton*, 1 Ves. Jr., 451.

tates; it was decreed that she should be deemed a specialty creditor, and be entitled to be paid the arrears of her annuity out of his personal estate in the course of administration; and if that was not sufficient, then out of the real estate in the settlement of which he was tenant in tail, provided such deficiencies did not exceed the amount of the dower which she would have been entitled to thereout, in case she had not accepted the annuity for her life.”¹

This decision is based upon the principle, that, for many purposes, equity considers that as done, which is agreed to be done, and which ought to be done.

Under this head may be mentioned an implied trust which arises between the assignee of a chose in action not negotiable and the legal debtor. At law, the action for the recovery of the debt must be in the name of the assignor. But equity raises an *implied trust* between the assignee and the ultimate debtor, and enforces directly the collection in favor of the party entitled to the ultimate benefit. Or, simply, equity makes the party who is *ultimately* liable, *immediately* so.²

¹ See preceding note.

² *Riddle v. Mandeville*, 5 Cranch, 322; *Story's Eq.*, sec. 1087 and 1250; *Russel v. Clark's Ex'rs*, 7 Cranch, 69, 97; *McCall v. Harrison*, 1 Bro. Ch. R., 126; *Buck v. Swasey*, 35 Main, 52; *Story's Eq.*, sec. 790 to 793, and 1213.

15. IMPLIED TRUSTS ARISING IN CASES OF THE RIGHT OF PRIORITY OF PAYMENT, ETC.

The stock and other property of private corporations are first liable for the payment of corporation debts, so that the creditors thereof have a lien upon all such property for their claims. The property of the corporation is deemed a trust fund for the payment of the debts of the corporation, and consequently the creditors have a right of priority of payment. Upon the dissolution of such a corporation the creditors may pursue the property and enforce their claims, unless it has passed into the hands of *bona fide* purchasers; for such property will be deemed to be held in trust, first, for the payment of the corporation debts; and second, for the benefit of the stockholders, in proportion to their respective interests.¹

The same principle is applicable to incorporated as well as unincorporated companies. The capital stock is deemed a *trust fund* for the payment of the debts of the company² and must be so applied until the debts are paid. Consequently, in case of an incorporated bank, if the capital stock should be divided among the stockholders, before the debts

¹ Story's Eq., sec. 1252; *Mumma v. The Potomac Co.*, 8 Peters, 281; *Pattison v. Blanchard*, 1 Seld., 189; *Whiteright v. Stimpson*, 2 Barb. S. C. R., 379; *Ketchum v. Durkee*, 1 Barb. Ch. R., 480; *Egberts v. Wood*, 3 Paige, 517; see also *Coles v. Coles*, 15 Johns., 159, on the subject of real estate held in partnership in N. Y.; *Buchan v. Sumner*, 2 Barb. Ch. R., 199, 200.

² *Buchan v. Sumner*, 2 Barb. Ch., 199, 207; *Nicoll v. Mumford*, 4 J. Ch. R., 522.

were paid, the funds in their hands, arising from such division, would be held in trust for the payment of all debts of the bank, and every stockholder receiving his share of the capital stock, in equity, would be held to a *pro rata* contribution to the extent of stock received.¹

Partnership property is also primarily liable for the debts of the firm, and the partners among themselves, have a right to have the partnership property first applied to the payment of the debts of the firm. And in case of insolvency the joint creditors have a right, in equity, to the rights of the partners, as being the ultimate *cestuis que trust* of the fund, to the extent of their joint debts.²

It is held that the joint creditors must first obtain judgment and have execution thereon before this priority of payment can be enforced,³ or a bill to enjoin a creditor of one partner from levying on the partnership property can be sustained.³

Joint debtors are, with respect to their relation as such, and the transactions in which they are united, treated as partners, and subjected to all the consequences of that relation. Each joint debtor is

¹ Wood v. Dummer, 3 Mason R., 308; Vose v. Grant, 16 Mass. R., 505, 517, 522; Spear v. Grant, 16 Mass., 9, 15; Curson v. African Co., 1 Vern. R., 121; S. C., Skinner R., 84.

² Egberts v. Wood, 3 Paige, 517; Ketelhum v. Durkee, 1 Barb. Ch. R., 480; Whiteright v. Stimpson, 2 Barb. S. C. R., 379; Innes v. Lansing, 1 Paige, 583; Story's Eq., sec. 1253, 675, 1207, 1243; Campbell v. Mullett, 2 Swanst. R., 574; West v. Skip, 1 Ves., 237, 445; *ex parte* Ruffin, 6 Ves., 126, 128; Wood v. Dummer, 3 Mason R., 312; Murry v. Murry, 5 Johns. Ch. R., 60; Taylor v. Fields, 4 Ves., 396; Young v. Keighley, 15 Ves., 557.

³ Young v. Frier, 1 Stockton Ch. R., 465; *ex parte* Williams, 11 Ves., 3, 5, 6; *ex parte* Keadall, 17 Ves., 521, 526.

held as a principal for the payment of his portion of the joint debt, and as surety for each of his partners that they pay their share;¹ and although on the death of one of several joint debtors, their creditor, at law, must collect his debt from the survivor or survivors, yet they will have their remedy against his personal representatives to the extent of the assets in their hands.²

SECTION II. CONSTRUCTIVE TRUSTS.

A second class of implied trusts are those which are raised by mere legal construction, independent of any implied agreement or understanding between the parties that a trust should be raised, and in this respect they differ from those trusts which result from the presumed intention of the parties.

I CONSTRUCTIVE TRUSTS ARISING IN CASES OF ACTUAL AND CONSTRUCTIVE FRAUD.

The rights and interests of individuals in society, cannot be maintained, except upon principles of the utmost fidelity and integrity in their business relations and transactions with each other. The law regulating these things requires men to be honest in their intentions and truthful in their representations; and it treats all intentional departure there-

¹ Willard's Eq., 191; Reid v. McNaughton, 15 Barb., 178.

² Hammerly v. Lambert, 2 J. C. R., 209; Wilder v. Keeler, 3 Paige, 162; Brown v. Story, 2 Paige, 594; Lawrence v. Trustees of Leak's orphans, 2 Denio, 577; Butts v. Gunning, 5 Paige, 254.

from as fraudulent. The law abhors fraud, and will punish it by the administration of a *wholesome* justice in all cases; and even with a stern justice, in such cases as a moral and just sense would seem to demand. In equity the summary remedy is to convert the wrongdoer into a trustee, and the one whose rights have been invaded thereby into a *cestui que trust*, and then to enforce the execution of the trust.¹

It is said that courts have never ventured to lay down as a general proposition what shall constitute fraud;² and that no invariable rule can be established on this point.³ This is true, as to the facts and circumstances by which a fraudulent intent is to be proved; but it is not true as to what intent and corresponding action shall be deemed fraudulent. Actual fraud implies an intention to be unjust or to do injustice, through concealment or misrepresentation, and actions designed to carry out such intentions. It implies a criminal intent, and taints the consciences of all parties and privies thereto. The facts and circumstances by which this criminal intent may be presumed, aside from all express fraudulent declarations, are endless and infinite; and, as a general rule, should be left to the determination of each particular case. The conflict of authorities upon the question, what shall be

¹ Story's Eq., sec. 184; *Chesterfield v. Jansen*, 2 Ves., 155; *Gale v. Gale*, 19 Barb., 251.

² Per Lord Eldon, in *Mortlock v. Buller*, 10 Ves., 306; *Lawley v. Hooper*, 3 Atk., 279.

³ Hill on Trustees, 145.

deemed fraudulent *per se*, and what, merely *presumptive of fraud*, has arisen from an attempt to deduce the principle of fraud, from the *evidence*, rather than from the *intention*; and there will not be a settled uniformity of decisions on these or other questions until courts learn to keep in mind a distinction between the *fact* to be proved and the *evidence* by which the fact is to be established.

An examination of every class of cases, where there has been the most doubt and uncertainty as to what the law is or should be, will show that the doubt and conflict of decision has arisen from confounding *the thing* to be proved with the *evidence* by which it is to be proved; and in most cases the judges making those conflicting decisions, profess to be governed by the same legal principles and have the same just ends in view.

Lord Hardwick, in the case of *Chesterfield v. Jansen*,¹ distinguished the cases of fraud, against which courts would relieve into four classes:

1. Fraud arising from facts and circumstances of imposition.

2. Fraud apparent from the intrinsic value and subject of the bargain itself, such as no man in his senses and not under a delusion would make, on one hand, and as no honest or fair man would accept on the other.

3. Fraud which may be presumed from the condition and circumstances of the parties contracting.

4. Fraud collected from the circumstances of the

¹ 2 Ves., 115; Hill on Trustees, 145; Story's Eq., sec. 188.

transaction as being an imposition or deceit upon other persons not parties to the fraudulent agreement.¹

In each of the foregoing class of cases, the principle governing is the same. The fraudulent intent against which the court relieves is the wicked intention to deprive another of his just rights; and that to which his lordship refers as the basis of distinguishing the several classes from each other, consists in the diverse facts and circumstances from which that criminal intent may be inferred. The fraud itself consists in the execution of that fraudulent intent, or in an attempt at executing it. Where the evidence is clear that the owner of property has been wrongfully deprived of it, or induced to part with it under influences designed and well calculated to deceive him, whether that evidence consists in the declarations and admissions of the fraudulent party, or in his acts, such as wilful concealment of facts, or whether it is to be gathered from all the circumstances of the case, the court, being satisfied of the fraud, will grant relief, where it can do so, without injury to an innocent party.²

Upon the question whether certain facts were to be deemed conclusive evidence of fraud, or whether they were to be deemed only *prima facie* evidence thereof, there has been much conflict of authority. This conflict has arisen, as in other cases, from the almost endless variety and combination of circum-

¹ See preceding note.

² See *Seymour v. Wilson*, 19 N. Y. R., 417.

stances attending each particular case, which distinguish it from other cases in which the leading facts are the same, or very similar, and courts in giving their decisions have not been careful to keep distinctly in view, the difference between the fraud to be ascertained, and the evidence from which they infer its existence. The great point about which there has been so much doubt and uncertainty among the judges is, whether the fraud which is to be inferred from certain facts, shall be an inference of law, drawn by the court, and resulting *inevitably* from such facts ; or, whether the facts shall be only evidence of fraud, to be submitted to the jury, and susceptible of explanation.¹

Upon the principle, that it is the province of the jury to find the facts, upon which the court is to declare the law, and fraudulent intentions and fraudulent actions, being facts to be proved and legally ascertained, before the law can be declared in any given case, it would seem to be more in accordance with the principles of administrative justice to leave all such facts to the finding of the jury, and, hence, susceptible of explanation if any could be given.

There has been a very great contrariety of decisions in cases where possession has not accompanied the sale of personal property. Such fact has been held by some, to be conclusive evidence of fraud, and one which would admit of no explanation. By others, it has been held to be only *prima facie* evi-

¹ 2 Kent's Com., 515.

dence, and might be explained like any other fact;¹ and, while in many states, it is held to be conclusive evidence of fraud, the current of decisions tends to show the impropriety of any such rule. There are a thousand circumstances which may make it necessary and proper for the vendor to retain the possession of goods for a limited time after the sale is absolute, without injury to any one; or without a tendency to deceive or defraud any one: and in those countries and states where the contrary doctrine is held, they find it necessary to create exceptions to the general rule, to avoid the grossest injustice.¹ As the question of fraud depends upon the motive, wherever the motive can be shown to be upright and just, it is unjust and fraudulent to treat it otherwise.

In England, it is laid down as a general rule, that when possession does not accompany the sale of the chattel, that circumstance is to be considered as *conclusive* evidence of fraud; and the transaction is to be deemed fraudulent in point of law. But the exceptions have necessarily become so numerous as to nearly destroy the rule. In the case of *Edwards v. Harben*,² the King's Bench laid down the principle,

¹ *Edwards v. Harben*, 2 Term. R., 587; *Twyne's case*, 3 Co., 87; also Law Lib., Vol. XXVII., N. S., in Smith's selection of Leading Cases in America; *Shep. Touch.*, 66; *Paget v. Perchard*, 1 Esp. N. P. R., 205; *Wordell v. Smith*, 1 Camp. N. P. R., 332; *Eastwood v. Brown, Ry. & Mo.*, 312; *contra*, *Wooderman v. Baldock*, 8 Taunt., 676; *Jezeph v. Ingram*, 5 Taunt., 212; 2 Kent's Com., 520; *Ib.*, 516 to 535, and his copious notes and authorities.

² 2 Term., 587; see also *Paget v. Perchard*, 1 Esp. N. P. R., 205; *Wordell v. Smith*, 1 Campb. N. P. R., 332.

that where the vendee took an absolute bill of sale to take effect immediately by the face of it, and agreed to leave the goods in the possession of the vendor for a limited time, such an absolute conveyance, without the possession, was such a circumstance *per se*, as made the transaction fraudulent in point of law.¹

Wherever the circumstances attending the sale are such as to make the non-delivery of the goods consistent with the deed, the court are inclined to seize upon such circumstances, and admit of such explanation as may be given,² holding that non-delivery of possession is only *prima facie* evidence of fraud. Chancellor Kent³ says, that, "there have been many exceptions taken, and many qualifications annexed to the general rule; and it has become difficult to determine when the circumstance of possession not accompanying and following the deed, are *per se* a fraud in the English law, or only presumptive evidence of fraud to be disclosed at the trial. It certainly is not any thing more, if the purchaser was not a creditor at the time, and the goods were under execution, and the transaction was notorious, and not, in point of law clandestine or fraudulent."³

Notwithstanding the general rule as laid down in the case of *Edwards v. Harben*, the tendency has

¹ See preceding note.

² *Bucknal v. Roiston*, Prec. in Ch., 285; *Cadogan v. Kennett*, Cowp. Rep., 432; *Eastwood v. Brown, Ryan & Moody*, 312.

³ 2 Com., 518; see *Kidd v. Rawlinson*, 2 Bos. & Pul., 59; see also *Cole v. Davies*, 1 Ld. Raym., 724; *Lady Arundel v. Phipps*, 10 Ves., 145; *Watkins v. Birch*, 4 Taunt. R., 823.

been to overthrow it entirely, as it must be in every other country where a similar rule prevails. It is impossible for any court to foresee the endless variety of circumstances which may arise, where the application of such a rule would be unjust; therefore it is far better, to treat the continued possession of the vendor or mortgagor as *prima facie* evidence of fraud, and not fraud *per se*. There can be little difficulty in the application of such a principle, leaving the jury at all times, to find the fact of fraud or not, upon the evidence.

In the United States, the Federal Courts have adopted the doctrine of *Edwards v. Harben* according to the decisions both of the Supreme, and Circuit Courts.¹ In several of the States the same rule has been adopted,² while in others, the continued possession of the vendor is deemed to be only *presumptive evidence* of fraud, which may be explained.²

But however much States or countries may differ upon the question, as to what is fraud *per se*, and what is only *prima facie evidence* of fraud, they very generally agree as to the manner of treating it when it is clearly ascertained. The law requires men to be just and honest in their intentions, and truthful in their representations, in their business intercourse with each other; and whenever, in violation of such requirement, one fraudulently acquires the possession of the property or estate of another, with-

¹ *Hamilton v. Russell*, 1 Cranch R., 310; *U. States v. Conyngham*, 4 Dall. R., 358; *S. C.*, Wallace, C. C. R., 178; *Meeke v. Wilson*, 1 Gall. R., 419.

² See Kent's Com., vol. II., pp. 521 to 532.

out gross laches on the part of the other party, the law will treat such fraudulent party as the trustee of the other party, and will decree him to execute such trust.

These constructive trusts arise in cases of constructive fraud. By constructive fraud, is meant such acts or contracts, as are deemed equally reprehensible with positive fraud, although not originating in any evil design to injure any person; but because of their tendency to deceive or mislead others, or to impair public confidence, they are discountenanced.¹ The end of the law is to secure exact justice to all men; to this end, it aims at shutting out all inducements to perpetrate wrong, rather than rely upon mere punitive or remedial justice. Therefore it aims at prohibiting all such acts or contracts as would tend to mislead or deceive individuals, or impair the public interests. This it does, by disarming the parties of all legal sanction and protection for such of their acts as have such an injurious tendency.¹

1. CASES WHICH ARE DISCOURTENANCED BECAUSE THEY
ARE CONTRARY TO SOME GENERAL PUBLIC POLICY,
OR SOME FIXED ARTIFICIAL POLICY OF THE LAW.

1. As against public policy, may be considered contracts and agreements respecting marriage, known as marriage brokerage contracts. Courts of equity interfere in cases of this sort from consid-

¹ Story's Eq., sec. 258.

erations of public policy.¹ When one party engages to give another a compensation in consideration that such other party will negotiate for him an advantageous marriage, he seeks to introduce influences and considerations in the formation of matrimonial alliances whose tendencies must be fatal to that sound morality and good faith which alone can make such an alliance a blessing to the parties and to society. Therefore, equity will not suffer a bond or other premium given for procuring a marriage, to be enforced by the party to whom it is given, because such transaction is a fraud upon the rights of others, as well as detrimental to the best interests of society.² So averse are courts of equity to contracts of this kind, that they hold them incapable of confirmation,³ and even money paid under them, may be recovered back again in a court of equity.⁴

For similar reasons the law discountenances all secret contracts made with parents, guardians, or others standing in peculiar relation to the party,

¹ Fonbl. Eq., B. 1, chap. 4, sec. 11; *Drury v. Hook*, 1 Vern., 412; *Kemp v. Colman*, 1 Salk., 156; *Baker v. White*, 2 Vern., 215; *Boynton v. Hubbard*, 7 Mass. R., 118.

² *Drury v. Hook*, 1 Vern., 412; *Smith v. Brunnig*, 2 Vern., 392; *Roberts v. Roberts*, 3 P. Wm., 76; *Smith v. Aykwell*, 3 Atk., 566; *Cole v. Gibson*, 1 Ves., 507; *Debenham v. Ox*, 1 Ves., 277; *Williamson v. Gihon*, 2 Sch. & Lef., 357; *Story's Eq.*, sec. 260; 1 Fonbl. Eq., B. 1, chap. 4, sec. 10, note (r); *Newland on Contracts*, 469 to 472; *Boynton v. Hubbard*, 7 Mass., 112; *Shirley v. Martin*, cited in 3 P. Wm., 75; same case, in 1 Ball & Beatty, 357; *Hall v. Potter*, 3 Leo., 411; *Hylton v. Heylon*, 2 Ves., 548.

³ *Cole v. Gibson*, *ut supra*; 1 Fonbl. Eq., *ut supra*, note (s); *Roberts v. Roberts*, *ut supra*; *Cox*, note 1.

⁴ *Smith v. Brunnig*, *ut supra*; 1 Fonbl. Eq., *ut supra*; *Goldsmith v. Brunning*, 1 Eq. Abridg., 89, F.

whereby, upon a treaty of marriage, a consideration is to be received. The law holds all such contracts and agreements void, as being of a mischievous tendency, and against public policy. Thus, where a bond was taken by a father from his son, upon his marriage, it was held void, as being obtained by undue influence or under parental awe.¹ So, where a party upon his marriage with the daughter of A., gave the latter his bond for a sum of money in order to obtain his consent to the marriage, it was held as utterly void.²

All these transactions being void, as against public policy, and consequently conferring no legal and equitable rights whatever, it follows that those parties who acquire the possession of property under such agreements, do not acquire the legal right thereto, and therefore, hold in trust for the legal owners thereof. Courts of equity take this high ground for the purpose of throwing such security around the contract of marriage as will place all parties upon the basis of good faith, mutual confidence, and equality of condition.³

Neither will equity permit any underhanded management or agreements with any of the parties to interfere with the open and public treaty and agreement of marriage. Thus, where upon a marriage, a settlement was agreed to be of certain pro-

¹ See 1 Fonbl. Eq., B. 1, chap. 4, sec. 10, 11, also *Williamson v. Gihon*, 2 Sch. & Lef., 362; 2 Eq. Abridg., 187.

² *Keat v. Allen*, 2 Vern., 588; see 1 Fonbl. Eq., B. 1, chap. 4, sec. 11.

³ Story's Eq., sec. 267; *Lamlee v. Hanman*, 2 Vern., 499, 500; *Pitcairne v. Ogbourne*, 2 Ves. Sr., 375; *Neville v. Wilkinson*, 1 Bro. Ch. R., 543, 547.

perty by relations on each side, and after marriage, one of the parties procured an underhand agreement from the husband to defeat the settlement in part, the underhand agreement was set aside and the original settlement carried into full effect.¹ Courts of equity hold all such agreements as fraud upon innocent parties, and therefore void.² Thus, also, where the parent declined to consent to a marriage with the intended husband on account of his being in debt, and the brother of the intended husband gave his bond for the debt, to procure such consent, and the intended husband gave his secret counter bond to his brother to indemnify him, and the marriage proceeded upon the faith of the extinguishment of the debt, the counter bond was treated as a fraud upon the marriage, and all parties were held entitled the same as if the counter bond had not been given.³

So likewise, if a third party, for the purpose of influencing the happening of the marriage, make false and fraudulent representations he shall answer therefor. Thus, where upon a treaty of marriage, a party to whom the intended husband was indebted concealed his own debt and misrepresented to the wife's father the amount of the husband's debts, the transaction was treated as a fraud upon the marriage, and the creditor was prevented, by injunction,

¹ *Payton v. Bladwell*, 1 Vern. R., 240; *Stribblehill v. Brett*, 2 Vern. R., 445; *Prec. in Ch.*, 165.

² *Story's Eq.*, sec. 267.

³ *Redman v. Redman*, 1 Vern., 348; *Scott v. Scott*, 1 Cox R., 366; *Turton v. Benson*, 1 P. Wm., 496; see also *Palmer v. Neave*, 11 Ves., 165; *Lamlee v. Hamlin*, 2 Vern., 466.

from enforcing his debt, although it did not appear that there was any actual stipulation on the part of the wife's father, in respect to the amount of the husband's debts.¹

For the like reason a settlement secretly made by a woman, in contemplation of marriage, of her own property to her own separate use, without the knowledge of her intended husband, is in derogation of the marital rights of the husband, and a fraud upon his just expectations.² So likewise a secret conveyance in favor of a person for whom she is under no moral obligation to provide, would be deemed fraudulent.³ In all cases of this character a trust would result to the husband of all such property.⁴

2. Where there is a conveyance or a devise to trustees upon a secret understanding that the property is to be applied to illegal purposes, or for the accomplishment of objects which the policy of the law forbids, the law will not allow such conveyances to take effect, as being in fraud of the rights of the parties who would otherwise be entitled thereto, as well as upon the legislature itself; and a

¹ *Neville v. Wilkinson*, 1 Bro. Ch. R., 543; S. C., P. Wm., 74, Cox, note; Fonbl. Eq., B. 1, chap. 4, sec. 11, note (x); *Montefiori v. Montefiori*, 1 W. Black. R., 363; also *Thompson v. Harrison*, 1 Cox R., 344; see Story's Eq., sec. 271, 272, and authorities cited.

² See Story's Eq., sec. 273, and authorities; *Jones v. Martin*, 3 Anst. R., 882; *Lance v. Norman*, 2 Ch. R., 41; *Blanchet v. Foster*, 2 Ves., 264; *England v. Downs*, 2 Beavan, 522; *Cole v. O'Niel*, 3 Md. Ch. Decis., 174.

³ *England v. Downs*, *ut supra*; *Cheshire v. Payne*, 16 B. Monr., 618.

⁴ *Hunt v. Mathews*, 1 Vern., 408; *Strathmore v. Bowes*, 2 Bro. C. C., 345; S. C., 2 Cox, 28, and 1 Ves. Jr., 22; *Ball v. Montgomery*, 2 Ves. Jr., 191; *Goddard v. Snow*, 1 Russ., 485; see Hill on Trustees, and authorities cited, p. 163.

constructive trust will arise in favor of the party who would have become legally entitled upon failure of the illegal gift. Where a bill is filed by the heir at law, alleging such a trust, it is held that the defendants are bound to answer, notwithstanding the Statute of Frauds.¹

3. Upon a similar ground, as being against public policy and in fraud of the rights of innocent parties, equity will not permit to be enforced a bond or other premium for procuring a public office or situation for another.² These contracts for the buying, selling or procuring of public offices have an influence to diminish the respectability, responsibility and purity of public officers, and to introduce a system of official patronage and corruption, wholly at war with the public interest.³ Says Justice Story, such contracts are justly deemed contracts of moral turpitude, and are calculated to betray the public interests into the administration of the weak, the profligate, the selfish and cunning.⁴ These contracts are therefore held as utterly void; being contrary to the soundest public policy.

4. It is deemed to be against public policy to impose restraints upon trade generally, therefore bar-

¹ *Muckleston v. Brown*, 6 Ves., 52, 67; *Strickland v. Aldridge*, 9 Ves., 516; see *Russell v. Jackson*, 10 Hare, 204; *Chamberlain v. Agar*, 2 V. & B., 259; *Podmore v. Gunning*, 7 Sims., 644.

² *Whittingham v. Burgoyne*, 3 Anst., 900; *Morris v. McCulloch*, Ambl., 432, and 2 Ed., 190; *Hartwell v. Hartwell*, 4 Ves., 811, 15.

³ Story's Eq., sec. 295; 1 Fonbl. Eq., B. 1, chap. 4, sec. 4, note (u); *Chesterfield v. Jansen*, 1 Atk., 352; S. C., 2 Ves., 124, 156; *Boynton v. Hubbard*, 7 Mass. R., 119; *Hartwell v. Hartwell*, 4 Ves., 811, 815.

⁴ Story's Eq., sec. 295, see authorities there cited.

gains and contracts made in restraint of trade, if designed to be general, are void.¹ Contracts and agreements restraining the exercise of a particular trade, by certain individuals in certain particular places, or for certain limited periods, if made upon a good or valuable consideration, are valid. It is not deemed to be against public policy for an individual to agree to desist from the exercise of a particular trade in a particular locality; because the public interest is not limited by any such locality, and he is left at liberty to exercise it elsewhere.² But if the restriction be general and unqualified it is void, as against public policy.¹ Cases of this character, where the legal possession of property has been changed, give rise to constructive trusts, which courts of equity enforce.

5. In many cases property is directed to be sold at public auction to the highest bidder, as in the case of the sale of chattels or other property on execution. It is in accordance with justice and the policy of the law that there should be competition at such sales, that the property may bring a fair price; to this end it usually requires a public place to be selected for the sale, and public notice to be given of the time and place and articles sold; it is therefore against public policy and the requirements

¹ Story's Eq., sec. 292; See *Mitchell v. Reynolds*, 1 P. Wm., 181; also *Pierce v. Fuller*, 8 Mass. R., 223; also *Morris v. Colman*, 18 Ves., 436; *Alger v. Thatcher*, 19 Pick., 51; *Lawrence v. Kidder*, 10 Barb., 653.

² See *Tainter v. Ferguson*, 7 Com. B. Rep., 716; *Hartley v. Cummings*, 5 Com. B. Rep., 247; *Mallen v. May*, 11 M. & W., 653; *Hastings v. Whitley*, 2 Exch. R., 611; *Nichols v. Stratton*, 10 Q. B. Rep., 346; *Lange v. Worke*, 2 Ohio R., 519; see Story's Eq., sec. 292, and authorities cited.

of justice for individuals, by agreement, to combine to defeat or avoid a just and fair competition at such sales. Therefore agreements in which parties engage not to bid against each other at these public sales are void, as being against justice and public policy. Such agreements operate as a fraud upon the sale.¹ It is equally against public policy to employ underbidders to enhance the price, or in any manner to deceive the bidders; and if it is done, and bidders are thereby deceived, the sale will be held to be void.²

6. It is the policy of the law to secure a prompt and faithful administration of the government in every department thereof; and to discountenance every influence which would lead to violations of the trust reposed in the officers of the law; consequently, all agreements founded upon violations of public trust and confidence are held to be void; and so far as they amount to direct bribes, criminal. Hence any agreement by which a public officer is to receive an extra remuneration for doing that which the duties of his office require, is deemed to be fraudulent and against public policy. The object apparent in such a case, is to exert an undue influence upon the officer, which shall tend to swerve him from a faithful performance of his duty. Thus, a contract to procure the passage of an act of the legislature by

¹ *Jones v. Caswell*, 3 Johns. Cases, 29; *Doolin v. Ward*, 6 Johns. R., 194; *Wilber v. Howe*, 8 Johns., 444; *Gardner v. Morse*, 25 Main., 140; *Brisbane v. Adams*, 3 Comst., 130; *Hamilton v. Hamilton*, 2 Rich. Eq. R., 355.

² Story's Eq., sec. 293, and authorities there cited.

any improper means, such as using personal influence with the members, is void, as being against public policy, and the integrity of our political institutions.¹ So, likewise, an agreement by a deputy sheriff to pay the sheriff a certain sum as the price of his appointment, is void.² Likewise an agreement by a party to a suit, with a witness, that he will pay him for his attendance on court a certain sum, and more if he succeeds, is manifestly corrupt, and void.³ So, where a city charter prohibited any member of the council from being interested in any contract, the payment for which was to be made by a vote of such council, and a member of the council, by a secret agreement with a contractor became interested in such contract, a note given by the contractor to such member, for his share of the profits, is absolutely void, even in the hands of an innocent assignee.⁴ Upon the same principle, all agreements for the suppression of criminal prosecutions are void, as having a tendency to subvert public justice.⁵

7. Another class of agreements which are void, as being against public policy, are those founded on corrupt considerations, or moral turpitude. All such contracts, whether directly prohibited by statute or not, are considered as frauds upon the moral law, upon which all law is based, and from which

¹ Story's Eq., sec. 293; *Clippenger v. Hepbaugh*, 5 Watts & Serg., 315; *Wood v. McCann*, 6 Dana, 366; *Pingry v. Washburn*, 1 Aikens, 264; *Gray v. Hook*, 4 Comst., 449.

² *Ferris v. Adams*, 23 Vern., 136.

³ *Dawkins v. Gill*, 10 Alab., 206.

⁴ *Bell v. Quinn*, 2 Sandf., 146; Story's Eq., sec. 293.

⁵ Story's Eq., sec. 294, and authorities cited.

it derives its chief sanction. Hence, all agreements of whatever character, no matter how formally or solemnly entered into, all bonds or securities given as the price for future illicit intercourse, are void absolutely.¹

In all cases of the foregoing character, where the bonds, agreements, etc., are void as being against public policy, implied or constructive trusts may arise. Money or property may have been passed between the parties in performance of the whole or a part of such agreements, which is liable to be recovered back, and, for the time being, converting one party into a trustee for the other, or for such other persons as may be legally entitled to the same. To determine accurately when trusts may or may not arise in cases of this kind, it will be necessary to consider the nature and extent of relief which courts of equity will grant to persons who are parties to such agreements, and are therefore deemed *participes criminis*. In general, courts of equity follow the rule of law, and will interpose to grant no relief to parties to illegal agreements.² They will never aid in the execution of such agreements, neither will they grant relief to a party where his complaint shows that he still relies upon the terms of his immoral contract for relief.³ But if the party asking relief repudiates the agreement or other transaction upon the ground that it is against public policy, and washes his hands

¹ Story's Eq., sec. 296, and authorities cited.

² Story's Eq., sec. 298; *Harrington v. Bigelow*, 11 Paige, 349.

³ Story's Eq., sec. 296; *Bates v. Chester*, 5 Beavan R., 103.

of all wrong in the premises, relief will be granted notwithstanding his former relation as *participes criminis*. This relief, however, is given, more in behalf of the public than of the party, and is based rather upon principles of public policy than private justice.¹ In cases where public policy seemed to demand it, courts of equity have not only granted relief by setting aside the agreement or other transaction, but, in many cases, have ordered a repayment of the money which had been paid under such agreement.² Lord Thurlow was of the opinion that in all cases where money had been paid for an illegal purpose, it might be recovered back; and that public policy would not permit one who had thus obtained possession of money or property, to retain it; but that the parties should be put back in the state they were in before the transaction,³ and there is much good sense in his Lordship's opinion. But the current of modern authorities is against that doctrine.⁴ Courts of equity are much inclined to leave the parties to all such agreements without aid, unless public policy plainly requires it.⁴ They adhere to the old maxim, *in pari delicto potior est conditio defendentis, et possidentis*.

A careful investigation of all the authorities will

¹ *St. John v. St. John*, 11 Ves., 536; *Hatch v. Hatch*, 9 Ves., 292; *Bromley v. Smith*, Doug. R., 695; *Story's Eq.*, sec. 298.

² See *Neville v. Wilkinson*, 1 Bro. Ch., 547, 548; 18 Ves., 382; *Smith v. Brunning*, 2 Vern. R., 392.

³ *Inhabitants of Worcester v. Eaton*, 11 Mass. R., 375-379; *Sharp v. Taylor*, 2 Phillips' Ch. R., 801.

⁴ See *Rider v. Kidder*, 10 Ves., 356; *Smith v. Bromley*, Doug. R., 696, note; also *Adams v. Barrett*, 6 Georgia R., 404.

show that Equity, as well as the law, looks rather to the maintenance of a sound public policy in granting relief in all the foregoing class of cases, than to the private claims of the party *in delicto*; and wherever, in the opinion of the court, public policy requires it, they will not only set aside the argument as void; but will order all moneys or other property passed under it, to be returned; and will, for that purpose, raise an implied or constructive trust.¹

2. ARISING OUT OF THE PECULIAR AND CONFIDENTIAL RELATION OF THE PARTIES.

There is yet another class of constructive frauds which arise out of the peculiar, confidential, or fiduciary relation existing between the parties. The facts upon which the court act become significant from such relation of the parties. The relief granted in this class of cases, proceeds upon the hypothesis that an undue influence has been exerted, by means

¹ Hill on Trustees, 164; Smith v. Brunning, 2 Vern., 392; Morris v. McCulloch, Amb., 432. As to agreements against public policy, see Davison v. Seymour, 1 Bosworth, (N. Y.,) 88; Carroll v. Shelds, 4 E. D. Smith, (N. Y.,) 466; Millon v. Hayden, 32 Alab., 30; Pettit v. Pettit, 32 Alab., Spinks v. Davis, 32 Miss., 152; Fireman's Ch. Ass., v. Berghaus, 13 La. An., 209; Shelton v. Marshall, 16 Texas, 344; Deffy v. Shockey, 11 Ind., 70; Edy v. Capron, 4 R. I., 394; Ingram v. Ingram, 4 Jones Law, (N. C.,) 188; Stanly v. Nelson, 28 Alab., 514; Cunningham v. Cunningham, 18 B. Mour., (Ky.,) 19; Burger v. Rice, 3 Ind., 125; Sedgwick v. Stanton, 4 Kern., (N. Y.,) 289; Bryan v. Reynolds, 5 Wis., 200; Schermerhorn v. Talman, 4 Kern., (N. Y.,) 93; Atlas Bank v. Nahant Bank, 3 Met., 581; Smith v. Bromley, 2 Doug., 696. As to what may or may not be void according to circumstances, Bellows v. Russel, 20 N. H., 427; Dodge v. Stiles, 26 Conn., 463; Gibson v. Pearsall, 1 E. D. Smith, (N. Y.,) 90.

of the confidence or trust reposed in the party. Says Justice Story, "In this class of cases, there is often to be found some intermixture of deceits, imposition, overreaching, unconscionable advantage or other marks of direct and positive fraud."¹ Courts act upon the principle that where confidence is reposed, it shall be faithfully acted upon, and preserved from any intermixture of imposition; that they will not permit a party, standing in a situation where he can avail himself of such confidence, to derive any advantage from that circumstance; for to do so, would be to encourage a breach of confidence. Therefore where an honest confidence is reposed, and that confidence is abused, equity will grant relief,²

1. *Parent and Child.*

The relation of parent and child is one of affection and confidence; and the influence which the parent naturally has over the child may be abused; although it is to be presumed that parental affection, in all cases, is superior to selfish considerations. Yet courts of justice have been obliged to watch over the interests of children, to protect them from parental overreaching; therefore, contracts and conveyances by children for the benefit of parents are objects of

¹ Story's Eq., sec. 307; see *Goddard v. Carlisle*, 9 Price R., 169; *Gallatania v. Cunningham*, 8 Cowen R., 361; *Taylor v. Taylor*, 8 Howard U. S. C. R., 200.

² *Gartside v. Isherwood*, 1 Bro. Ch. R., App., 560; *Osmond v. Fitzroy*, 3 P. Wm., 129, 131, Cox notes; Story's Eq., sec. 300; *Spink v. Davis*, 32 Miss., 152.

judicial jealousy; and if circumstances show that they were not made in scrupulous good faith, or are not reasonable, they will be set aside.¹ The presumption, however, is in favor of parental honesty and good faith; and, in the absence of circumstances, evincing a contrary state of things, such contracts and conveyances will be deemed fair and honest, as between the parties.² The same principle applies to those standing in *loco parentis*.³ It also applies to other domestic or family relations, as between brothers and sisters. Thus, where three brothers induced their sister, who had a reversionary interest in lands devised by their father to the brothers for life, to release her interest to them without any consideration, except a belief that their father intended to devise the land to the brothers in fee, the deed was set aside, it appearing that the sister was in a feeble state of health and had always relied upon the brothers for advice.⁴

It is obvious that when an advantage has been taken of the confidence incident to such relation, and money or other property has been obtained thereby, it is the duty of the court to raise a trust in favor of the defrauded party.

¹ *Slocum v. Marshall*, 2 Wash. C. C. R., 397; *Baker v. Bradley*, 3 Eng. L. and E. R., 449; *Jenkins v. Pye*, 12 Peters' R., 253, 254; *Hill on Trustees*, 157, and authorities cited; *Slocum v. Marshall*, 2 Wash. C. C. R., 397; *Taylor v. Taylor*, 8 How. U. S., 183.

² See *Jenkins v. Pye*, *ut supra*; *Story's Eq.*, sec. 308, 309.

³ *Archer v. Hudson*, 7 Beavan, 551; see *Maitland v. Irving*, 15 Sim., 437; also *Maitland v. Buckhouse*, 16 Sim., 68.

⁴ *Sears v. Shafer*, 2 Seld., 268; *Boney v. Hollingsworth*, 23 Alab., 690; *Hewitt v. Crane*, Halst. Ch. R., 159.

2. Guardian and Ward.

The relation existing between guardian and ward is such, that the principles of a sound public policy require a close and rigid supervision on the part of courts of equity, of all gifts or conveyances to the guardian by his ward, on coming of age. The case is much stronger for relief, than is that of parent and child; because the guardian is not supposed to be under the influence of that affection for his ward, which the parent has for his child; and, consequently, has not that check upon his selfish feelings. The court acts upon the broad principle of public utility, for the purpose of discouraging all such transactions; and will relieve against them, although in the particular instance, there be no actual unfairness or imposition.¹

Courts watch with so much jealousy, transactions of this character, Lord Eldon observed, that when the connection is not dissolved, the account not settled, and everything remaining pressing upon the mind of the party under the care of the guardian, it was almost impossible that the transaction should stand.² And the guardian will not be discharged from his responsibility as guardian, immediately on

¹ *Pierce v. Waring*, cited 1 Ves., 380, and 2 Ves., 548; *Hylton v. Hylton*, 2 Ves., 547; *Hatch v. Hatch*, 9 Ves., 297; *Dawson v. Murray*, 1 Ball & B., 229; *Aylward v. Kearney*, 2 Ball & B., 463; *Wood v. Downes*, 18 Ves., 126; *Hunter v. Atkins*, 3 M. & K., 135; *Johnson v. Johdson*, 5 Alab., 90; *Somes v. Skinner*, 16 Mass., 348; *Scott v. Freeland*, 7 Sm. & M., 410; *Williams v. Powell*, 1 Ired. Eq., 460; *Caplinger v. Stokes*, Meigs, (Tenn.), 175; *Wyman v. Hooper*, 2 Gray, 141.

² *Hatch v. Hatch*, 9 Ves., 296; *Cary v. Mansfield*, 1 Ves., 379; *Wright v. Proud*, 13 Ves., 138; 1 Mad. Ch. R., 172; *Story's Eq.*, sec. 320; *Wood v. Downes*, 18 Ves., 126.

his ward's arriving at full age,¹ but time will be given to allow the ward an opportunity to investigate the accounts of the guardian. Lord Hardwick, in the case of *Hylton v. Hylton*,² said "Where a man acts as guardian, or trustee in the nature of a guardian, for an infant, the court is extremely watchful, to prevent that person from taking any advantage immediately upon his ward coming of age, and at the time of settling accounts or delivering up the trust, because undue advantage may be taken."³ It would give an opportunity, either by flattery or force, by good usage unfairly meant, or by bad usage imposed, to take such an advantage; and, therefore, the principles of the court are of the same nature with relief in this court on the head of public utility, as in bonds obtained from young heirs, rewards given to an attorney pending a cause, and marriage brokage bonds. All depends upon public utility: and, therefore the court will not suffer it, though perhaps in a particular instance, there may not be actual unfairness. The rule of the court as to guardians is extremely strict, and in some cases, does infer some hardship: as where there has been a great deal of trouble, and he has acted fairly and honestly, and yet he shall have no allowance. Judge Willard, in his *Equity Jurisprudence*⁴ remarks, that the great jealousy with which courts

¹ Willard's Eq., 182; in matter of Horne, 7 Paige, 46.

² 2 Ves., 547.

³ *Boyett v. Hurst*, 1 Jones Eq., 166; *Heard v. Daniel*, 26 Miss., (4 Cush.,) 451; *Overton v. Beavers*, 19 Ark., 623.

⁴ Willard's Eq., 185.

watch the dealings between guardian and ward on the termination of that relationship, is owing to the fact that the mind of the ward might be misled by undue kindness or forced by oppression, to make a gift. And whether it was granted under either of these influences, or was an act of rational consideration, could never be fully known to the court. To allow such gifts to stand, would increase the difficulty of getting property from the hands of the guardian. That under the rule, as settled by the courts, there is no inducement to withhold a settlement to extort a gratuity.¹ Neither can he purchase for himself where his ward is concerned.²

3. *Attorney and Client.*

The relation of attorney and client is one which is quite liable to abuse. The great confidence which the client has in the advice and skill of his attorney gives the attorney a very strong influence over his actions. The superior legal knowledge of the solicitor, and the intimate knowledge he has of his client's situation, together with the confidence of the client, which he possesses, put it in his power to avail himself of his client's necessities, liberality, and credulity, to obtain for himself great advantages; hence the law watches over the transactions between parties in this relation, with great jealousy.³

¹ See preceding note.

² *Bostwick v. Atkins*, 3 Comst., 53; *Wyman v. Hooper*, 2 Gray, 141; *Worrell's App.*, 11 Harris, (23 P. St. R.,) 44.

³ See *Wood v. Downes*, 18 Ves., 126; *Hunter v. Atkins*, 3 M. & K., 113; *Gibson v. Jayes*, 6 Ves., 277; *Wright v. Proud*, 15 Ves., 138; *Hatch v. Hatch*, 9 Ves., 296; *Jennings v. McConnel*, 17 Ill., 148; *Wilson v. Moran*,

Lord Brougham in the case of *Hunter v. Atkins*,¹ declared the rule to be "that if a person, standing in the relation of attorney to client, guardian to ward, trustee to *cestui que trust*, takes a gift or makes a bargain, the proof lies upon him to show that he has dealt with the other party, the client, ward, etc., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing every thing to his knowledge which he himself knew, in short, the rule rightly considered, is, that the person standing in such relation, must, before he can take a gift, or even enter into a transaction, place himself exactly in the same position as a stranger would have been in, so that he may gain no advantage whatever from his relation to the other party beyond what may be the natural and unavoidable consequence of kindness arising out of that relation."¹

Justice Story says,² "The burden of establishing the perfect fairness, adequacy and equity of the transaction, is thrown upon the attorney, upon the

3 Barb., 172; *Wallis v. Labat*, 2 Denio, 607; *Starr v. Vanderhyden*, 9 Barb., 253; *Ford v. Harrington*, 16 N. Y. Rep., 285; *Giddings v. Eastman*, 5 Paige Ch., 561; *Evans v. Ellis*, 5 Denio, 640; *Barnard v. Hunter*, 39 Eng. L. and Eq. R., 569.

¹ 3 M. & Keen, 113; see *Hooper v. Burnett*, 26 Miss., 428; *Scoby v. Ross*, 5 Ind., 445; *Holman v. Loynes*, 27 Eng. L. and Eq. Rep. 168; *Starr v. Vanderhyden*, 9 Johns., 253; *Lewis v. J. A.*, 4 Edw., 599; *Giddings v. Eastman*, 5 Paige, 561; *Evans v. Ellis*, 5 Denio, 640; *Ellis v. Messerole*, 11 Paige, 467; *Wilson v. Moran*, 3 Brad., 172.

² Eq. Jurisprudence, sec. 311; see also *Montesquieu v. Sandys*, 18 Ves., 302; *Cane v. Ld. Allen*, 2 Dow., 289; see 6 Ves., 278; *Sugden on Vend. and Purch.*, vol. III., p. 238, 10th ed.; *Howell v. Ransom*, 11 Paige, 538; *Ford v. Harrington*, 2 Smith, 285.

general rule, that he who bargains in a matter of advantage, with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence.¹ In cases of this kind, seeking relief, the nature of the proof required by the court must depend upon the circumstances of each particular case, according as they may have placed the attorney in a position in which his duties and his pecuniary interests were conflicting, or which may have given him a knowledge which his client did not possess, or some influence, ascendancy, or advantage over his client.²

This doctrine of the relation of attorney to client is not limited to those cases where their contracts or transactions respect the rights of property in controversy, in respect to which the attorney or solicitor is advising or acting, but it may, according to the circumstances, extend to other contracts, transactions, etc., where there is reason to presume the attorney possessed some special influence, ascendancy or advantage over his client.³

An examination of the authorities shows the doctrine to be as above stated; that, before the court will support a gift to an attorney, or a purchase by him from his client, it must be fully satisfied that the transaction is unaffected by fraud of

¹ See preceding note.

² *Edwards v. Meyrick*, 2 Hare R., 60, 68; *Hunter v. Atkins*, 3 M. & K., 135, 136; *Merritt v. Lambert*, 10 Paige, 352; *Wallis v. Loubat*, 2 Denio, 607; *Howell v. Ransom*, 11 Paige, 538; *Lewis v. J. A.*, 4 Edw., 599; *Ford v. Harrington*, 16 N. Y. Rep., 285.

³ *Story's Eq.*, sec. 310; *Holman v. Loynes*, 23 L. J. Ch., 530; see *Wood v. Downes*, 18 Ves., 127, also *Bellow v. Russel*, 1 B. & Beat., 104.

any description, actual or constructive, and the burden of establishing its perfect fairness, adequacy and propriety rests with the attorney.¹ Therefore if such proof cannot be given the case will be treated as one of *constructive fraud*, and a constructive trust will be raised in favor of the client.²

In the case of *Henry v. Raiman*,³ the Supreme Court of Pennsylvania held that an attorney is not only prohibited from acquiring any interest in property, about the title to which he has been professionally consulted, or in regard to which he has conducted a suit; but that this prohibition does not terminate with the relation of counsel and client, but is perpetual in its character, and follows the title of the client into whosoever hands it may pass, so that any purchase of adverse claims, incumbrances or the like, by the attorney, will be in trust for the holder of that title.⁴ It has also been held in Louisiana that the attorney for the plaintiff, on the recovery of a judgment which was a lien on land, could not buy it in, on sale thereof on execution, against his client.⁵ The rule applying to

¹ *Hill on Trustees*, 160, also *Harris v. Tremenhe*, 15 Ves., 34; *Cane v. Ld. Allen*, 2 Dow., 289; *Montesquieu v. Sandys*, 18 Ves., 302; *Billow v. Russel*, 1 Ball & B., 104; *Hawley v. Cramer*, 4 Cow., 717; *Evans v. Ellis*, 5 Denio, 640.

² *Holman v. Loynes*, 23 L. J. Ch., 530; *Wilson v. Moran*, 3 Brad., 172; *Ford v. Harrington*, 16 N. Y. Rep., 285.

³ 25 Penn. St. R., 354.

⁴ See *Wood v. Downes*, 18 Ves., 127; also *Billow v. Russel*, 1 B. & Beat., 104.

⁵ *Stockton v. Ford*, 11 How. U. S., 232; see *Oldham v. Hand*, 2 Ves., 259; *Hall v. Hallett*, 1 Cox, 134; *Leisenring v. Black*, 5 W., 303; *Bank v. Foster*, 8 W., 305; *Devinley v. Norris*, 8 W., 314; *Dobbins v. Stevens*, 17 S. & R., 13.

attorneys also applies to the managing clerk in the solicitor's office, who has, in that capacity acquired the confidence of the client, and who deals with him in a matter with which he became acquainted as clerk.¹ And also to one who acts as confidential adviser before a magistrate where attorneys do not appear.²

It is the general policy of courts of justice to protect suitors from any undue influence or advantage the attorney or solicitor may have over them; therefore they will look carefully into all transactions between them, for the purpose of protecting the client's interests. Thus, where a bond has been obtained by an attorney from a client who is in poor and distressed circumstances, unless it appear to be for a full and fair consideration, it will be set aside as constructively fraudulent.³ Or where the attorney has taken from his client a bond for a certain sum, it will not be allowed to stand as a security, except for the amount of fees and charges due to the attorney.⁴

4. *Principal and Steward.*

Similar to the doctrine relating to gifts and purchases, between attorney and client, is also the doctrine with respect to gifts and sales by the principal to his steward or agent. The steward having

¹ *Poillon v. Martin*, 1 Sandf. Ch., 569.

² *Buffalow v. Buffalow*, 2 Dev. & Batt. Eq., 241.

³ *Proof v. Hines*, Cas. T. Talb., 111; *Warmesley v. Booth*, 2 Atk., 29.

⁴ *Newman v. Payne*, 4 Bro. Ch. R., 350; S. C., 2 Ves. Jr., 200; *Langstaffe, v. Taylor*, 14 Ves., 262; *Pitcher v. Rigby*, 9 Price R., 79; *Jones v. Roberts*, 9 Beav. R., 419; *Story's Eq.*, sec. 312, 313, and authorities cited.

charge of the principal's property to the extent of his stewardship, is presumed to be acquainted with its character and value, and the principal depends upon the judgment and fidelity of the steward for his knowledge thereof; therefore the steward is bound to make out a case of the utmost fidelity on his part, if he would have a gift or a sale from his principal to himself sustained. In the case of *Lord Selsey v. Rhoads*,¹ the law was thus clearly stated by Sir John Leach, V. C.: "There is no rule of policy which prevents a steward from being a lessee under his employer. There is no rule of policy which prevents a steward from receiving from the bounty of his employer a beneficial lease. But where the transaction proceeds not upon motives of bounty but upon contract, there the steward is bound to make out that he gives the full consideration, which it would have been his duty as steward, to obtain from a stranger; and where the transaction is mixed with motives of bounty, there the steward is bound to make out that the employer was fully informed of every circumstance respecting the property which was within his knowledge, or ought to have been, which could tend to demonstrate the value of the property, and the precise measure and extent of the bounty of the employer. This doctrine may be considered as comprised in the general maxim, that a steward dealing with his employer shall derive no advantage from his situation as steward. The employer may, if he please,

¹ 2 S. & S., 49, 50; S. C. 1 Bligh, 1.

treat with his steward preferably to any other person; and this preference is a bounty. But the steward cannot take advantage of this preference unless he fully imparts to his employer all the circumstances of existing competition.”¹

The relation of the steward to his employer, differs nothing from that of agent to principal, for the steward, in matters pertaining to his stewardship, is the agent of the principal, and is bound to act for the interest of his employer; therefore the law as applicable to agents dealing with their principals, will further illustrate the duties of the steward in dealing with his employer.

5. *Principal and Agent.*

When the principal contracts for the services of his agent, he contracts for the aid and benefit of all his skill and judgment in the transaction of business committed to his care. It is to be presumed the principal employed him, and entrusted his business to his care, because of his esteemed skill and fidelity; and the habitual confidence reposed in the agent, causes his acts and statements to possess a commanding influence over his principal.² Therefore, it is in accordance with a sound public policy, that gifts procured, or purchases made by agents from their principals, should be examined with a most rigorous scrutiny. In all cases of purchases by agents from their principals, there is a

¹ See preceding note.

² Story's Eq., sec. 315; see also *Reed v. Warner*, 5 Paige, 650.

necessary conflict between interest and duty ; which condition of things is unfavorable to integrity and fair dealing. It is a rule in equity of universal application, that no person can be permitted to purchase an interest in property where he has a duty to perform which is inconsistent with the character of purchaser.¹ This rule is applicable to all classes of persons standing in fiduciary relations, or relations of confidence. This rule was well stated by the judge who delivered the opinion of the Supreme Court of the United States, in the case of *Michoud v Girod*.² "The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private ; but the value of the prohibition is most felt, and its application is more frequent, in the private relations in which the vendor and purchaser may stand to each other. The disability to purchase, is a consequence of that relation between them which imposes on the one a duty to protect the interests of the other ; from the faithful discharge of which duty his own personal

¹ *Torrey v. Bank of Orleans*, 9 Paige, 663; *Hawley v. Cramer*, 4 Cowen, 736; *Van Epps v. Van Epps*, 9 Paige, 237, 241; *Cram v. Mitchel*, 1 Sandf. Ch. R., 251; *Dobson v. Racey*, 3 Id., 61; *Shannon v. Marmaduke*, 14 Texas, 217.

² 4 How. S. C., 503; *Wormley v. Wormley*, 8 Wheat., 421; *Provost v. Gratz*, 6 Wheat., 481; *Shannon v. Marmaduke*, 14 Texas, 217; see *Swofford v. Gray*, 8 Ind., 508; *Meeker v. York*, 13 La. An., 18; *Moore v. Moore*, 1 Seld., 256; *Utica Ins. Co. v. Toledo Ins. Co.*, 17 Barb., 132; *N. Y. Cent. Ins. Co. v. Nat. Prot. Ins. Co.*, 4 Kern., 85, and 20 Barb., 468; *Watkins v. Cousall*, 1 E. D. Smith, 65; *Vanderpool v. Kearnes*, 2 E. D. Smith, 170; *Dunlop v. Richards*, 2 E. D. Smith, 181.

interests may withdraw him. In this conflict of interest the law wisely interferes. It acts on the possibility that, in some cases, the sense of that duty may prevail over motives of self-interest; but it provides against the probability, in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominating influence, and supersede those of duty. It therefore prohibits a party from purchasing that on his own account, which his duty or trust requires him to sell on account of another; and from purchasing on account of another, that which he sells on his own account. In effect he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells.”¹ This rule applies to guardians,² trustees,³ solicitors and attorneys,⁴ to executors and administrators, and all others standing in like confidential and fiduciary relations.⁵

Upon these principles, if the agent sell to his principal his own property, as the property of another, without disclosing the fact that the property is that of the agent, the bargain will be held

¹ See preceding note.

² *Pierce v. Waring*, cited 1 Ves., 380, and 2 Ves., 548; *Hylton v. Hylton*, 2 Ves., 547; *Hatch v. Hatch*, 9 Ves., 297.

³ *Horne v. Meeres*, 1 Vern., 465; *Ayliffe v. Murry*, 2 Atk., 59.

⁴ *Harris v. Tremenheene*, 15 Ves., 34; *Hill on Trustees*, 160, and authorities cited.

⁵ *Van Horn v. Fonda*, 5 Johns. Ch., 388; *Evertson v. Tappan*, 5 Johns. Ch., 497; *Davou v. Fanning*, 2 Johns. Ch., 252; *Case v. Able*, 1 Paige, 393; *Campbell v. Johnston*, 1 Sandf. Ch., 148; *Ward v. Smith*, 3 Sandf. Ch., 592; *Ames v. Downing*, 1 Brad., 321; *Stiles v. Burch*, 5 Paige, 132.

to be void, at the election of the principal.¹ So also if the agent, employed to purchase for another, purchases for himself, he will be considered the trustee of his employer.² So also, if an agent discover a defect in the title of his principal to land, he can not misuse his discovery to acquire the title for himself, if he do, he will be held a trustee for his principal.³ Where likewise, an individual is employed as agent to purchase up a debt of his employer he is bound to purchase it at as low a rate as possible; if, therefore, he purchase it upon his own account, he will be deemed as acting for his principal, and will be entitled to no more than he paid for it.⁴

6. *Trustee and Cestui que Trust.*

The same doctrine of constructive fraud, and consequent trust, applies to transactions between trustee and *cestui que trust*. A trustee may purchase from his beneficiary provided there is a distinct and definite contract, and one in which there is no fraud, no concealment of information acquired by him in his character as trustee, and no other advantage taken. But the contract must be such as will appear fair, after the most jealous examination.⁵ In cases

¹ *Gillet v. Pepercorn*, 3 Beavan, 78, 83, 84.

² See Story's Eq., sec. 316, and authorities quoted; *Seis v. Nutall*, 1 Russ. & M., 53; S. C., 1 Tamlyn R., 282.

³ *Rengo v. Binns*, 10 Peters, 269.

⁴ See *Reed v. Norris*, 2 Mylne & Craig, 361, 374; *Hitchcock v. Watson*, 18 Ill., 289; *Moore v. Moore*, 1 Seld., 256.

⁵ *Coles v. Trecothick*, 9 Ves., 234; *Morse v. Royal*, 12 Ves., 372; *Naylor v. Winch*, 1 S. & St., 567; *Lyon v. Lyon*, 8 Ired. Eq., 201; *Pennock's App.*, 14 Penn. St., 446; *Bruch v. Lantz*, 2 Rawle, 392; *Harrington v.*

where the trustee sells to himself, and thus combines the character of vendor and purchaser, the sale is *prima facie* invalid. Lord Erskine held that all such sales or contracts were of themselves void, and that they were so, independent of all considerations of fraud, or looking beyond the relation of parties.¹ This decision would seem to be in accordance with the true policy of the law. But there are decisions which look to a relaxation of Lord Erskine's rule. Cases of such sales have been sustained where it was shown that the fiduciary relation of the purchaser had ceased previous to the purchase.² So likewise in cases where the purchase was made with the full knowledge and consent of the beneficiaries, every thing being fair and honest connected with the transaction.³ So likewise where the *cestui que trust* has long acquiesced in the sale, he will ultimately loose his right to question the transaction.⁴ These and similar decisions show that the transaction is not necessarily void, but nevertheless it would not be sustained if unaided by other circumstances.⁵

Brown, 5 Pick., 519; Dunlap v. Mitchel, 10 Ohio, 117; Jenison v. Hapgood, 7 Pick., 1; Zimmerman v. Harmon, 4 Rich. Eq., 165; Jones v. Smith, 33 Miss., 215.

¹ Morse v. Royal, 12 Ves., 372; McConnell v. Gibson, 12 Ill., 128; Lewis v. Hillman, 3 H. L. Cas., 628; Chronister v. Bushey, 7 W. & S., 152.

² *Ex parte* Bennett, 10 Ves., 393; *ex parte* Lacey, 6 Ves., 626; Downes v. Grazebrook, 2 Mer., 208; see Ball v. Carew, 13 Pick., 28; De Bevoise v. Sandford, 1 Hoff. Ch., 192.

³ Downes v. Grazebrook, *ut supra*; Randall v. Errington, 10 Ves., 428; Worthy v. Johnson, 8 Geo., 236.

⁴ Williams v. First Presb. Soc. in Cincinnati, 1 Ohio St. Rep., 478; Andrews v. Hobson, 23 Alab., 219; Campbell v. Walker, 5 Ves., 678; Powell v. Murry, 10 Paige, 256, aff'g 2 Edw., 636; Jones v. Smith, 33 Miss., 215.

⁵ See Campbell v. Walker, *ut supra*.

Where the purchase of the trustee from the beneficiary is questioned, and the trustee relies upon any corroborative circumstances to support his purchase, he must make them out beyond all question; for the court will look into the transaction with great jealousy, because it can never be certain that he has communicated to the *cestui que trust* all the information respecting the estate, which he has acquired as trustee; and if it be known that he has not made such communication, the purchase will be set aside.¹

The incapacity of trustees to purchase from their *cestuis que trust*, proceeds upon the principle that the trustee is in a situation which gives him exclusive advantages in acquiring a knowledge, or information, respecting the property of the beneficiary; and the policy of the law forbids that one in that situation, should be under the temptation to sacrifice integrity and violate the requirements of justice.² The law, therefore, very wisely discountenances all transactions of that character. But, as a principle ceases to apply, where the reason for its application ceases, this principle does not apply to merely nominal trustees, or as they are sometimes called, "dry trustees;" those who, practically, have no interest or power as trustees with respect to the trust estate.³

As a general rule, the trustee cannot purchase the trust property at auction, without establishing every

¹ *Ex parte* Lacey, 6 Ves., 226; *ex parte* Bennett, 10 Ves., 394; *Herne v. Meeres*, 1 Vern., 465; *Fox v. Mackreth*, 2 Bro. C. C., 400; *Scott v. Davis*, M. & Cr., 87; see *Bolton v. Gardner*, 3 Paige, 273; *Stuart v. Kissam*, 2 Barb., 493.

² *Baxter v. Costin*, 1 Busb. Eq., 262.

³ *Parker v. White*, 11 Ves., 226; *Naylor v. Winch*, 1 S. & St., 567.

circumstance necessary to be made out to make the transaction good as a private sale.¹ But where the *cestui que trust* has taken upon himself the conduct of all the preliminary proceedings requisite for the sale: such as the surveys, the mode and conditions of sale, the plans, the choice of the auctioneer, and the like, and the trustee has not been in a situation to acquire any exclusive information respecting the property; there is no good reason why the trustee, under such circumstances, should be excluded from becoming a purchaser; and, consequently, courts have dealt with contracts made under such circumstances, as though made between two indifferent persons.² There is a doubt if courts will go any further in such cases, than to leave both parties without aid.³ Where trustees have purchased the property of the *cestui que trust* at public or private sale, they take the property subject to the right of the *cestuis que trust* to set aside the sale at their option.⁴ But the *cestui que trust* must repudiate within a reasonable time, after information, or his right of repudiation will be gone.⁵

In case the trustee wishes to purchase any portion of the property of the *cestui que trust* during the

¹ *Campbell v. Walker*, 5 Ves., 678; *Lister v. Lister*, 6 Ves., 631; *Sanderson v. Walker*, 13 Ves., 601; *Beeson v. Beeson*, 9 Barr., 279; *Bostwick v. Atkins*, 3 Comst., 53; *Campbell v. Penn. Ins. Co.*, 2 Whart., 53; *Att'y Gen. v. Lord Dudley, Coop.*, 146; *Patton v. Thompson*, 2 Jones Eq., 285.

² *Coles v. Trecothick*, 9 Ves., 248; but see *Monro v. Allaire*, 2 Caine's Cas., 183; *Salmon v. Cutts*, 4 De G. & Sm., 131.

³ *Monro v. Allaire*, *ut supra*.

⁴ *Mason v. Martin*, 4 Md., 124; *Andrews v. Hobson*, 23 Alab., 219; *Spindler v. Atkinson*, 3 Md., 409.

⁵ *Follansbe v. Kilbreth*, 17 Ill., 522; *Jones v. Smith*, 3 Miss., 215.

continuance of his fiduciary character, he should purchase it under the sanction of the court, or with the full concurrence of the *cestui que trust*; and he must see to it, that there is no fraud and no concealment of information from his beneficiary, which he has derived in his character as trustee; and he must be prepared to make this appear should his transaction be questioned.¹

7. *Executors and Administrators.*

It is upon the same principles as above stated that executors and administrators are prohibited from dealing with the estate of their testators or intestates. The reason for the rule is obvious. Where executors and administrators are permitted to purchase for themselves that property which it is made their duty to sell, they would violate that principle of public policy which prohibits the same individual to combine the character of vendor and purchaser. Generally, in the United States, they are prohibited from purchasing, directly or indirectly, their testator's estate.² The application

¹ *Campbell v. Walker*, 5 Ves., 678; *ex parte Lacey*, 6 Ves., 625; *ex parte Haines*, 8 Ves., 348; *ex parte Bennett*, 10 Ves., 393; *Willard's Eq.*, 187; *Patton v. Thompson*, 2 Jones Eq., 285. :

² *Davoue v. Fanning*, 2 J. C. R., 252; *Michoud v. Girod*, 4 How. U. S. R., 504; *Drysdale's App.*, 14 Penn. S. R., 531; *Beeson v. Beeson*, 9 Barr., 279; *Lessees of Moody v. Vandyke*, 4 Binn., 31; *Winter v. Geroe*, 1 Halst. Ch., 319; *Ward v. Smith*, 3 Sandf. Ch., 592; *Ames v. Browning*, 1 Brad. (N. Y.), 321; *Roggers v. Rogers*, 3 Wend., 503; *Conway v. Green*, 1 H. & J., 151; *Hudson v. Hudson*, 5 Mumf., 180; *Bailey v. Robinson*, 1 Gratt., 4; *Edmunds v. Crenshaw*, 1 McCord's Ch., 252; *Baines v. McGee*, 1 Sm. & M., 308; *Brackenridge v. Holland*, 2 Blackf., 377; *Baxter v. Costin*, 1 Busbee Eq., 262.

of the rule cannot be evaded by the intervention of a third person, purchasing for the executor. The reason of the rule continues, and therefore the rule continues.¹ But where the sale was made in good faith to a stranger, without any previous understanding that the executor was to purchase, and the executor re-purchased from the stranger, the sale would be good.²

Executors and administrators who have the property of their testator in their hands, hold that property in trust for the payment of the debts and legacies, and for the application of the surplus according to the will of the testator, or according to the statute of distribution:³ and courts of equity proceed, in cases of this kind, as in the execution of trusts.⁴ Hence the law applicable to trustees purchasing the property of their *cestuis que trust*, is likewise applicable to executors and administrators purchasing the property of their testator.⁵ Therefore they are not allowed to purchase up the debts of the estate upon their own account.⁶

¹ *Beaubien v. Ponpard*, Harr. Ch., 206; *Woodruff v. Cook*, 2 Edw. Ch., 259; *Hawley v. Cramer*, 4 Cow., 717; *Davou v. Fanning*, 2 J. C. R., 252; *Hunt v. Bass*, 2 Dev. Eq., 292.

² *Silverthorn v. McKinster*, 12 Penn. St. R., 67.

³ Story's Eq., sec. 532.

⁴ *Adair v. Shaw*, 1 Sch. & Lefr., 262; *Farrington v. Knightley*, 1 Pr. Wm., 548; *Rathfield v. Careless*, 1 Pr. Wm., 161; *D. of Rutland v. Dutchess of Rutland*, 2 Pr. Wm., 210, 211; *Elliott v. Collier*, 1 Ves., 16; *Anon.*, 1 Atk., 491; *Wind v. Jekyll*, 2 P. Wm., 575; *Nicholson v. Sherman*, 1 Cas. Ch., 57; 1 Mad. Ch. Pr., 466.

⁵ *Greenlaw v. King*, 3 Beav., 49; *Van Epps v. Van Epps*, 9 Paige, 237; *ex parte Lacey*, 6 Ves., 628; *ex parte James*, 8 Ves., 346; *Whatten v. Toone*, 5 Mad., 54; *Watson v. Toone*, 6 Mad., 153.

⁶ Story's Eq., sec. 321; *Willard's Eq.*, 189, 604 to 606; *Torrey v. Bank of Orleans*, 9 Paige, 663; *Hawley v. Cramer*, 4 Cow., 736.

The executor cannot protect his purchase of the property of his testator by the fact that he purchased at a sale made under an order of the court for the payment of debts, even though the order was not obtained by himself.¹ It has also been held that where a creditor had caused the testator's property to be sold on an execution, the executor could not become a purchaser at such sale;² but this doctrine has been controverted.³ There may be circumstances attending such a purchase which would bring the executor within the general rule; and there may be circumstances where the rule would be excluded. The intention of the law is, in all cases, to exclude the possibility of fraud or want of fidelity on the part of the executor and administrator in the proper discharge of their duties.

Where an executor unites with others in the purchase of the estate of the testator, such joint purchase makes the whole sale voidable.⁴ Such sales, however, are not absolutely void, unless there be actual fraud on the part of the purchaser,⁵ and may therefore be confirmed by the heirs and legatees;⁶ or by long acquiescence; as long acquiescence or laches, in cases of fraud or mistake, is a bar to relief

¹ *Rham v. North*, 2 Yates, 117; *Beason v. Beason*, 9 Barr., 279.

² *Fleming v. Teran*, 12 Geo. 394; *Spindler v. Atkinson*, 3 Maryl., 410.

³ *Fisk v. Sarber*, 6 W. & S., 18; *Campbell v. Johnson*, 1 Sandf. Ch., 148; *Bank of Orleans v. Torrey*, 7 Hill, 260.

⁴ *Paul v. Squibb*, 12 Penn. St., 296; *Mitchum v. Mitchum*, 3 Dana, 260.

⁵ *Hudson v. Hudson*, 5 Mumf., 180; *Van Horn v. Fonda*, 5 J. C. R., 388.

⁶ *Pennock's App.*, 14 Penn. St. R., 446; *Bruch v. Lantz*, 2 Rawle, 392; *Dunlap v. Mitchel*, 10 Ohio, 117; *Longworth v. Goforth*, Wright R., 192; *Harrington v. Brown*, 5 Pick., 519; *Moor v. Hilton*, 12 Leigh, 2.

in equity; for it is one of the first principles of a court of equity that a party who seeks to establish a constructive trust in his favor, even on the ground of fraud, must use due activity and diligence in the prosecution of his claim;¹ accordingly it was laid down by Sir William Grant, M. R., in the case of *Beckford v. Wade*,² that, though no time bars a direct trust as between *cestui que trust* and trustee, yet a constructive trust will be barred by long acquiescence, although the ground of relief originally was clear and even arose in fraud.

8. General Cases.

These same principles are applicable to all who stand in like fiduciary and confidential relations to each other; for the like reasons, having their foundations in a sound public policy, must carry the rule with them. It is a rule which applies universally to all who come within the principle, which is, that no person shall be permitted to purchase an interest in property and hold it for his own benefit, when he has a duty to perform in relation to such property, which is inconsistent with the character of a purchaser on his own account, and for his individual use.³ Neither will a party be permitted to purchase from another party while standing in such relations thereto, as to be presumed to possess the unsuspect-

¹ *Smith v. Clay*, 3 Bro. C. C., 639; *Hill on Trustees*, 168.

² 17 Ves., 97; *Portlock v. Gardner*, 1 Hare, 594, 607; *Decouche v. Save-tir*, 3 Johns. Ch. R., 190.

³ *Willard's Eq.*, 189; *Van Epps v. Van Epps*, 9 Paige, 241; *Hawley v. Cramer*, 4 Cow., 717; *Brice v. Brice*, 5 Barb., 533.

ing confidence of, or controlling influence over the conduct and acts of the latter; for where the reasons for the application of the rule exist, there the rule will be applied. Hence, when there are relations created between parties, arising from friendly habits, or habitual reliance on the advice and assistance, accompanied with partial employment, in doing some sort of business, an undue influence may exist and be exerted.¹ Lord Brougham observed, in the case of *Hunter v. Atkins*,¹ that the limits of natural and often unavoidable kindness, with its effects, and of undue influence exercised, or unfair advantage taken, could not be rigorously defined. That it was not advisable that any strict rule should be laid down, or any precise line drawn by stating that certain acts should be the only tests of undue influence, or that certain things should be required in order to rebut the presumption of it. The circumstances of each particular case are to be examined and weighed, and on the result of such enquiry we are to determine whether or not an undue influence has been exerted, or any undue advantage has been taken.¹ Thus, when there has been a gift or sale to a confidential friend and adviser, or from a patient to his medical attendant, there may or may not have been undue influence exerted or advantage taken. The relation will authorize the court to look into the circumstances, and if it shall appear that there has been any concealment, misrepresentation or contrivance in procuring the gift or bargain, by which

¹ See remarks of Lord Brougham in *Hunter v. Atkins*, 3 M. & K., 140.

a fraud is to be inferred, the court will interfere and grant relief.¹ The principle is a plain one, and one of easy application when the facts are clearly ascertained. Where property has been acquired improperly under such influences, a constructive trust will be raised in favor of the injured party, unless it has passed into the hands of those entitled to protection. Justice Story, in his *Equity Jurisprudence*,² says: On the whole, the doctrine may be generally stated, that wherever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage.³

3. CONSTRUCTIVE FRAUDS WHICH DERIVE THEIR CHARACTER MAINLY FROM UNCONSCIENTIOUSLY COMPROMITTING OR INJURIOUSLY AFFECTING EITHER THE PRIVATE RIGHTS, INTERESTS OR DUTIES OF THE PARTIES THEMSELVES, OR OPERATE SUBSTANTIALLY AS FRAUDS UPON THE PRIVATE RIGHTS, INTERESTS, DUTIES, OR INTENTIONS OF THIRD PERSONS.³

1. *Mental weakness.*

And first of that class which affects the private rights, interests and duties of the parties themselves. Under this class will be considered those

¹ *Hunter v. Atkins*, *ut supra*; *Pratt v. Barker*, 1 Sim., 1; S. C., 4 Russel, 507; *Huguenin v. Baseley*, 14 Ves., 273; *Popham v. Brooke*, 5 Russ., 8; *Griffiths v. Robins*, 3 Mad., 191; *Dent v. Bennett*, 7 Sim., 539; S. C., 4 M. & Cr., 269; *Gibson v. Russell*, 2 N. C. C., 104.

² Story's Eq., sec. 323, also cites *Jeremy on Eq. Jurisd.*, B. 3, part 2, chap. 3, sec. 2, p. 395.

³ Story's Eq., sec. 328.

cases where an unconscientious advantage has been taken of persons disabled by their mental state or other incapacity, from protecting their own interests. The consent requisite to enable one to make a valid agreement is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on either side. Persons devoid of reason and understanding are incapable of giving a serious and firm assent.¹

The rule as to what constitutes mental incapacity is the same in law as in equity.² It is impossible to establish any standard of intellect as essential to legal capacity, beyond the unquestioned possession of reason in its lowest degree. The law, therefore, in fixing the standard of positive legal capacity or competency, says, that unless the mind betrays a total loss of understanding, or idiocy, or delusion, it cannot be considered legally unsound.³ From this, however, it is not to be inferred that courts give no heed to certain degrees of mental imbecility, which do not amount to absolute incompetency. On the contrary, when any considerable degree of mental imbecility appears, it induces a strict and vigilant

¹ Willard's Eq., 194; Story's Eq., sec. 231; 1 Fonbl. Eq., B. 1, chap. 2, sec. 3; Cook v. Clayworth, 18 Ves., 12; Reynolds v. Waller, 1 Wash. R., 207; Burk v. Allen, 9 Fost., (N. H.,) 106.

² Willard's Eq., 194; Bennett v. Vade, 2 Atkins, 327; Osmand v. Fitzroy, 3 P. Wm., 130.

³ Willard's Eq., 201; Stewart's Executors v. Lispenard, 26 Wend., 303; Odell v. Bucks, 21 Wend., 142; Petrie v. Shoemaker, 24 Wend., 85; Blanchard v. Nestle, 3 Denio, 37; Gillespie v. Shuliberrier, 5 Jones' Law R., 157; Van Deusen v. Rowley, 4 Seld., 358; Jackson v. King, 4 Cow., 207; Clark v. Fisher, 1 Paige, 171; Gardner v. Gardner, 22 Wend., 526; *ex parte* Vanaukin, 2 Stoct., (N. J.,) 186.

examination into the contracts and other transactions of the party, laboring under it: and, if coupled with gross inadequacy of consideration, or other impeaching circumstances, it will aid in constituting such evidence of fraud as may avoid the contract.¹

Mere weakness of mind alone, not amounting to idiocy or insanity, is not sufficient of itself to invalidate an instrument.² For it is impossible for the law to fix any standard short of the absence of all understanding; and it is unnecessary that it should, so long as mental weakness becomes a circumstance which the court will consider in determining whether any fraud or imposition has been practiced. Where there is great disparity of intellect between the parties, the court will be more vigilant, and will give more weight to other circumstances of a suspicious character; but still they will consider the parties competent to contract.³

¹ Willard's Eq., 202; *Cruise v. Christophers' Administrators*, 5 Dana, 182; *Reinieker v. Smith*, 2 Harr. and John., 422; see *Ingraham v. Baldwin*, 5 Seld., 45.

² *Ex parte Allen*, 15 Mass., 58; *Ripley v. Grant*, 4 Ired. Eq., 447; *Mann v. Betterly*, 21 Verm., 326; *Mason v. Williams*, 3 Munf., 126; *Morris v. McLeod*, 2 Dev. and Balt. Eq., 221; *Osmond v. Fitzroy*, 3 P. Wm., 130; 1 Mad. Ch. Pr., 373; 1 Story's Eq., sec. 235; *Person v. Warren*, 14 Barb., 488.

³ *Hadley v. Latimer*, 3 Yerg., 537; *Thomas v. Shepherd*, 2 McCord's Eq., 36; *Harding v. Handy*, 11 Wheat., 103; *Deatby v. Murphy*, 3 A. K. Marsh, 472; *Whitehom v. Hines*, 1 Munf., 557; *Brogden v. Walker*, 2 H. and J., 285; *Whelan v. Whelan*, 3 Cowen, 537; *Ripley v. Grant*, 4 Ired. Eq., 447; *Rumph v. Abercrombie*, 12 Alab., 64; *Tracey v. Sackett*, 1 Ohio St. N. S., 54; *Hill on Trustees*, p. 154, and authorities cited, as *Bridgman v. Green*, Wilm., 61; S. C., 2 Ves., 627, and Lord Thurlow's remarks in *Griffin v. Deublu*, 3 Woodleet's App., 16; Lord Denneval's case, 2 Ves., 407; 1 Fonbl. Eq., B. 1, chap. 2, sec. 3, notes (p) and (r), 1 Mad. Ch. Pr., 375; 1 Story's Eq., sec. 236; *Gartside v. Sherwood*, 1 Bro. C. C., 560; *Blackford v. Christian*, 1 Knapp, 77.

Therefore, while mental weakness of itself is not sufficient to invalidate an instrument, it is a circumstance of great importance in determining the effect and influence of other circumstances, and where, connected with other circumstances of an impeaching character, will have great weight. Thus, where the provisions of a deed, executed by such a person, are unreasonable and extraordinary, the fact of mental weakness will be considered in connection therewith;¹ or where the consideration is nugatory or insufficient;² or where, contrary to the truth, the instrument is stated to be made for a pecuniary consideration;³ or where practicing and influence have been actually used; or where the relation and situation is such that the same is to be presumed.⁴

It is immaterial from what cause this mental weakness may arise, or whether it be permanent or temporary. Such weakness may be natural or accidental, as general mental imbecility, natural incapacity from infancy, infirmity from extreme old age, or weakness and depression incident to a cer-

¹ *Fane v. Duke of Devonshire*, 2 Bro. P. C., 77; *Bridgman v. Green*, 2 Ves., 627; *Dent v. Bennett*, 7 Sim., 539; S. C., 4 M. & Cr., 269; *Sprague v. Duel*, Clark, 90.

² *Clarkson v. Hanway*, 2 P. Wm., 203; *Bridgman v. Green*, 2 Ves., 627; *Gartside v. Isherwood*, 1 B., C. C., 558; *Hutchinson v. Tindall*, 2 Green's Ch., 357; *Rumph v. Abercrombie*, 12 Alab., 64.

³ *Gibson v. Russel*, 2 N. C. C., 104.

⁴ *Portington v. Eglinton*, 2 Vern., 189; *Gartside v. Isherwood*, 1 Bro. C. C., 558; *Bridgman v. Green*, *ut supra*; *Edmunds v. Bird*, 1 V. & B., 542; *Kennedy v. Kennedy*, 2 Alab., 571; *M'Craw v. Davis*, 2 Ired. Eq., 618; *Buffalow v. Buffalow*, 2 Dw. & Batt., Eq., 241; *Hill on Trustees*, 155, and authorities.

tain state of physical health, or from sudden fears or overwhelming calamity. These and many other things may conspire to unfit the mind for the exercise of a sufficient degree of deliberation to enable it to give a valid assent to its undertakings. The fact that the party was mentally weak at the time, from whatever cause, is sufficient to put the court upon its guard, and if everything is not reasonable and fair connected with the transaction, fraud will be presumed.¹ For the court may not relieve because of the mental weakness alone, and will not; but if the least fraud can be shown in the party contracting with him, or that some undue means have been used to draw the party into the bargain, it will make out a case for relief.² The conclusion, therefore, is that the acts and contracts of persons who are of weak understandings, and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented or overcome by cunning or artifice, or undue influence.³ And where, upon an inquisition of lunacy, insanity is once found, its continuance is presumed, and the burden of proof is

¹ Story's Eq., sec. 235; 1 Fonbl. Eq., B. 1, chap. 2, section 3, note (r); Blackford v. Christian, 1 Knapp's R., 73, 77; Clarkson v. Hanway, 2 P. Wm., 203; Gartside v. Isherwood, 1 Bro. Ch. R. appendix, 559, 560, 561; Osmond v. Fitzroy, 3 P. Wm., 130.

² Willis v. Jarnegan, 2 Atk. R., 251; Story's Eq., sec. 236; Malin v. Malin, 2 Johns. Ch. R., 238; Shelford on Lunatics, chap. 6, sec. 3, p. 258, 267, 268, 272; White v. Small, 2 Ch. Cas., 103.

³ Story's Eq., sec. 238.

thrown upon those who would avail themselves of his acts, upon the ground that his disqualification has been removed;¹ although the maxim, "Once insane always insane," is not universally applicable,² and the report of lunacy on an inquisition is only *prima facie* evidence, and not conclusive as to third persons not parties.³

2. Drunkenness.

Excessive drunkenness is a temporary insanity; consequently, while an individual is under the influence of excessive drunkenness and utterly deprived of his understanding, he is not a rational being, and is incapable of giving a valid assent to any undertaking. The fact that the party was under an undue excitement from liquor at the time he made the contract, is not of itself sufficient to invalidate it.⁴ His drunkenness must have been of that degree which deprived him of the use of his reason and understanding, and thus have made him *non compos* at the time, before it, of itself, would be deemed sufficient to invalidate his agreements.⁵

¹ Terry v. Buffington, 11 Geo., 337.

² Stewart v. Redditt, 3 Md., 67; Keys v. Norris, 6 Rich. Eq., 388.

³ Field v. Lucas, 21 Geo., 447.

⁴ Pittenger v. Pittenger, 2 Green Ch. R., 156; Crane v. Conklin, Saxton Ch. R., 346; Belcher v. Belcher, 10 Yerger, 521; Jenness v. Howard, 6 Blackf., 240; Hutchinson v. Tindal, 2 Green Ch., 357.

⁵ Story's Eq., sec. 231; 1 Fonbl. Eq., B. 1, chap. 2, sec. 3—; Cook v. Clayworth, 18 Ves., 12; Reynolds v. Waller, 1 Wash. R., 207; Pickett v. Sutter, 5 Cal., 412; Cummings v. Henry, 10 Ind., 109; Rutherford v. Ruff, 4 Desaus' R., 350; Wade v. Colvert, 2 Rep. Court Ct., 27; Calloway v. Witherspoon, 5 Ired. Eq. R., 128; Peyton v. Rawlins, 1 Hayw., 77; Cole v. Robbins, Buller N. P., 172; Wigglesworth v. Steers, 1 Hen. & Mnf., 70.

The presumption is that every man is *compos mentis* until the contrary be proved. Therefore when an act is sought to be avoided on the ground of mental imbecility, the burden of proof is upon the one alleging it.¹ Where one would avoid a contract upon the ground of the intoxication of the party at the time it was made, he must prove that the party was entirely bereft of understanding at the time it was made, and that will be sufficient to avoid it.¹ This question was fully discussed and settled in the case of *Barrett v. Buxton*.² It was there decided that an obligation, executed by a man when deprived of the exercise of his understanding by intoxication, was voidable by himself, though the intoxication was voluntary and not procured through the circumvention of the other party.²

Courts of equity, upon principles of public policy, are not inclined to lend their assistance to a person who has obtained an agreement or deed from another in a state of intoxication. For, whatever may be the demerit of the drunkard himself, the party who has taken advantage of his drunkenness, is entitled to no favor or protection for his immoral conduct.³ Neither are the court disposed to render

¹ 2 Kent's Com., 451; *Pitt v. Smith*, 3 Camp. R., 33; 1 Starkie's N. P. Rep., 126; *Ring v. Harrington*, 1 Mills Const. Rep., 162; *Foot v. Tewksbury*, 2 Verm. Rep., 97; *Prentice v. Achorn*, 2 Paige R., 30; *Borroughs v. Richman*, 1 Green's N. J. Rep., 233; *Harbison v. Lemon*, 3 Blackf. Ind. Rep., 51; *Hotchkiss v. Fortson*, 7 Yerger, 67; *Gore v. Gibson*, 13 Meeson & Welsby, 623; *Gardner v. Gardner*, 22 Wend., 526.

² 2 Aikin's Vt. R., 167; see *Hutchinson v. Tindal*, 2 Green's N. J. Ch. R., 357.

³ Story's Eq., sec. 231, 232, 233.

assistance to the intoxicated party, to enable him to avoid his agreements. Unless there is some fraudulent contrivance or some imposition practiced, either actual or implied, they will be left to their ordinary remedies at law.¹

But, while courts will not relieve a party upon the mere ground of undue excitement from liquor, or intoxication not amounting to an entire suspension of the understanding, yet such intoxication may become an important consideration in determining the significance of other circumstances tending to show that fraud had been practiced.

In New York, after an inquisition has been found under the statute, that a man is of unsound mind in consequence of habitual drunkenness, and is incapable of conducting his own affairs, it is held that he cannot legally do or assent to any act binding him, although in fact he was sober and competent to transact business at the time.² And a purchase and conveyance of real estate, after proceedings are instituted to ascertain the incapacity of the grantor by reason of his habitual drunkenness, to transact business, will be set aside on proper application, provided the grantee had knowledge of the institution of the proceedings at the time of purchase.³

¹ Story's Eq., sec. 231; *Cook v. Clayworth*, 18 Ves. 12; *Newland on Contracts*, chap. 22, p. 365; *Rich v. Sydenham*, 1 Ch. Cas., 202; *Cragg v. Holme*, 18 Ves., 14, note; *Shiers v. Higgons*, cited 1 Madd. Ch. Pr., 399; *Nagle v. Baylor*, 2 Dr. & W., 64; *Shaw v. Thackery*, 1 Sm. & Giff., 537.

² *Wadsworth v. Sherman*, 14 Barb., 169; *Wadsworth v. Sharpsteen*, 4 Seld., 388.

³ *Griswold v. Miller*, 15 Barb. 520; *Imhoff v. Witmer*, 31 Penn. St. R., 341.

3. *Persons under Duress.*

Under the rule that the consent requisite to make a valid agreement is an act of reason, accompanied with deliberation; and that every true consent implies, first, a physical power; secondly, a moral power of consenting; and thirdly, a serious and free use of them;¹ one who is under duress, or under the influence of extreme terror, or threats, is to be presumed incapable of giving a free and serious assent to a contract; for in cases of this sort, he has no free will, but stands *in vinculis*; and it is a constant rule in equity, that where a party is not a free agent, and equal to protecting himself, the court will protect him.² On this account courts of equity watch with extreme jealousy all contracts made by a party while under imprisonment, and if there is the slightest ground to suspect oppression or imposition in such cases, they will set the contract aside.³ Formerly it was the doctrine that the duress must have been the *illegal* restraint of one's liberty, actually imposed, or through fear of mayhem, or loss of limb.⁴ But the modern doctrine is otherwise. Any duress by legal process or through fear, which, for the time being, deprives the party of the

¹ Willard's Eq., 194; 1 Fonbl. Eq., B. 1, chap. 2, sec. 1.

² Story's Eq., sec. 239; *Evans v. Llewellyn*, 1 Cox R., 340; *Crome v. Ballard*, 1 Ves. Jr., 215, 220; *Hawes v. Wyatt*, 3 Bro. Ch. R., 158; *Jeremy on Eq.*, B. 3, part 2, chap. 3, sec. 1; 2 Eq. Abridg't, 183; *Gilbt. Eq. R.*, 9; *Tilley v. Damon*, 11 Cush., 247.

³ Story's Eq., sec. 239; *Roy v. Duke of Beaufort*, 2 Atk., 190; *Nichols v. Nichols*, 1 Atk., 409; *Hinton v. Hinton*, 2 Ves., 634-5; *Falkner v. O'Brian*, 2 B. & Beatt, 214; *Griffith v. Spratley*, 1 Cox Rep., 333; *Underhill v. Harwood*, 10 Ves., 219; *Att'y Gen. v. Southern*, 2 Vern. R., 497.

⁴ 1 Black. Com., 133, 139.

free use of his will or consent, will be sufficient to entitle him to relief, provided advantage has been taken of such duress.¹ Thus, circumstances of extreme necessity and distress of the party may so entirely overcome his free agency as to justify the court in setting aside a contract made by him, on account of some oppression or fraudulent advantage or imposition attendant upon it,¹ for where advantage is taken of a person's extreme necessity or distress to obtain an advantageous bargain, the court will give redress.²

The doctrine of the common law upon the subject of avoiding contracts upon the ground of force, duress or undue influence, has been very much modified by modern decisions, and very properly so. The doctrine that the force or fear must be of such a nature as may well overcome a firm man is unreasonable. The doctrine of granting relief, when the contract has been obtained through duress by force or fear, has its basis in the hypothesis that the free will of the party has been destroyed, and consequently that the contract is not an expression of his free and deliberate assent. It is therefore unreasonable to subject a timid man to such a rule, for

¹ Story's Eq., sec. 239; *Gould v. Okeden*, 3 Bro. Parl. R., 560; *Bosanquet v. Dashwood*, Cas. Temp. Talbot, 37; *Proof v. Hines*, Cas. T. Talb., 111; *Hawes v. Wyatt*, 3 Bro. Ch. R., 156; *Picket v. Logan*, 14 Ves., 215; *Foshay v. Ferguson*, 5 Hill, 154; *Thompson v. Lockwood*, 15 J. R., 256; *Champlain v. People*, 2 Comst., 83; *Evans v. Begleys*, 2 Wend., 243; *Wakkins v. Baird*, 6 Mass. R., 506; *Richardson v. Duncan*, 3 N. H., 508; see *Neally v. Greenough*, 5 Foster, 325.

² *Hawes v. Wyatt*, *ut supra*; *Wood v. Abrey*, 3 Mad., 417; *Crawford v. Cato*. 22 Geo., 594.

the same degree of force or intimidation which would produce little or no influence upon a "firm man," might entirely overcome a timid one, and place him in the power of his oppressor. The modern rule is the more reasonable, and more in accordance with the principles of an advancing civilization.¹

4. *Common Sailors.*

This class of men are notoriously improvident and heedless in taking care of their money or other property, and seem to require the provident guardianship of the law during the whole course of their lives. They possess a strange mixture of character, credulous, generous, kind, heedless and brave. Such being their known character, courts of equity have been disposed to take an indulgent consideration of their interests, and to treat them as a class, in the same light with which young heirs and expectants are regarded.² They are frequently the victims of a cunning and vigilant class of knavish men who are on the alert to take advantage of their heedlessness, extravagance and generosity. They, as a class, are not equal to taking care of their own interests. Hence, their contracts respecting their wages, prize money, etc., are watched with great jealousy; and

¹ *Soule v. Bonney*, 37 Maine, 128; *Taylor v. Cottrell*, 16 Ill., 93; *Brown v. Peck*, 2 Wis., 261; *Strong v. Grannis*, 26 Barb., 122; *Barr v. Barton*, 18 Ark., 214; *Barblet v. Wyman*, 14 Johns., 260; *Champlain v. People*, 2 Comst., 83; *Harmony v. Bingham*, 1 Duer, 209; *aff'd* 2 Kern., 99.

² *Story's Eq.*, sec. 332; *Huguenin v. Basley*, 14 Ves., 271; *Davis v. Duke of M.*, 2 Swanst, 147, note (a); *Jeremy Eq.*, B. 2, part 2, chap. 3, sec. 4; *Thornhill v. Evans*, 2 Atk R., 330; *Howe v. Weldon*, 2 Ves., 516; *Fonbl. Eq.*, B. 1, chap. 2, sec. 12, note (k).

where any undue advantage has been taken of them or great inequality appears in their bargains, they are generally relievable.¹

5. *Young Heirs ; Reversioners ; Remaindermen, etc.*

It is a rule in equity, that persons in contracting with each other, shall not only act in good faith between themselves, but shall not act in bad faith in respect to others who stand in such relations to either of the parties as to be affected by their contracts or by the consequences of them.² Of such a character are those catching bargains or unconscionable purchases made from young heirs in the lifetime of their parents, by persons other than those standing in *loco parentis*. As a matter of public policy, courts have extended to them such a degree of protection as almost to amount to an incapacity in young heirs to bind themselves by any contract respecting their expectancy.³ The professed object of the rule, giving such protection to the expectant heir, is to restrain the anticipation of expectancies, which must, from its nature, furnish designing men an opportunity of practicing upon the inexperience

¹ Story's Eq., sec. 332, note (3), refers to Parsons on Contracts, where the authorities are collected, 1 Vol. Contracts with Seamen; *How v. Weldon*, 2 Ves., 517.

² *Chesterfield v. Jansen*, 2 Ves., 156, 157; Story's Eq., sec. 333; *Hill on Trustees*, 153; *Willard's Eq.*, 178; Story's Eq., sec. 334.

³ *Willard's Eq.*, 178; Story's Eq., sec. 336; *Hill on Trustees*, 153; *Gwynone v. Heaton*, 1 Bro. Ch. R., 1, 9; *Peacock v. Evans*, 16 Ves., 512; *Knott v. Hill*, 1 Vern., 167; *Earl of Portmore v. Taylor*, 4 Sims, 182; *King v. Hamlet*, 4 Sim., 223, and S. C., 2 M. & K., 456; *Newton v. Hunt*, 5 Sim., 54; *Jenkins v. Pye*, 12 Peters, 241; *Varick v. Edwards*, 1 Hoff. Ch., 383; *Davidson v. Little*, 22 Penn. St., 252

or passions of a dissipated man.¹ In the language of Justice Story:² “The relief is founded in part in the policy of maintaining *quasi* parental authority, and preventing the waste of family estates. It is also founded in part upon an enlarged equity, flowing from the principles of natural justice; upon the equity of protecting heedless and necessitous persons against the designs of that calculating rapacity which the law constantly discountenances; of succoring the distress frequently incident to the owners of unprofitable reversions; and of guarding against the improvidence with which men are commonly disposed to sacrifice the future to the present, especially when young, rash and dissolute.”³

Although the degree of protection extended to young heirs is such as to render all contracts with them respecting their expectancy very insecure, yet it is not to be inferred that such contracts may not be binding. An expectancy may be sold, provided it be fairly done; but it is the duty of the vendee to show that it is so done. Every presumption is against it.³ The vendee must, therefore, make good the bargain; and show that the transaction was perfectly fair in every respect, and untainted with ac-

¹ Willard's Eq., 178.

² Story's Eq., sec. 335; see *Davis v. Duke of Marlborough*, 2 Swanston, 147, and Reporter's note; *Twistleton v. Griffith*, 1 P. Wm., 310; *Cole v. Gibbons*, 1 P. Wm., 293; *Baugh v. Price*, 1 Wils. R., 320; *Barnardiston v. Lingwood*, 2 Atk., 135; *Bowes v. Heaps*, 3 Ves. & B., 117, 119, 120; *Walmesley v. Booth*, 2 Atk., 27, 28; *Mad. Ch. Pr.*, 97, 98, 99.

³ *Coles v. Trecothick*, 9 Ves., 246; *Gowland v. De Faria*, 17 Ves. 25; Willard's Eq., 178; Story's Eq., sec. 336.

tual or constructive fraud; and, particularly, that the consideration paid was adequate.¹ Inadequacy of consideration between persons standing upon an equality of condition is not regarded as a cause for equitable interposition, unless, from its grossness, it evinces fraud.² But it is otherwise in case of expectant heirs.³

The law in these cases, acting upon the hypothesis that advantage has been taken of the necessities of the young heir, and that there is an implied fraud upon the ancestor, who is ignorant of the transaction, and who has been seduced to leave his estate, not to his heir or family, but to a set of artful persons who have divided the spoil beforehand,⁴ does not apply to that class of cases where the heir has subsequently recognized the transaction, and acted upon it;⁵ neither does it apply where the sale was effected with the knowledge and sanction of the parent, or the one from whom the expectancy is to come.⁵ As the rule, in part, is aimed at preventing the practice of deceit and imposition upon the parent or other ancestor, from whom the expectancy

¹ Hill on Trustees, p. 153; Knott v. Hill, 1 Verm., 167; Chesterfield v. Jansen, 2 Ves., 125; Peacock v. Evens, 16 Ves., 512; see Jenkins v. Pye, 12 Peters, 241.

² See Willis v. Jernegan, 2 Atk., 251; Gwynne v. Heaton, 1 Bro. C. C., 8; Heithcote v. Paignon, 2 Bro. C. C., 175, Underhill v. Horwood, 10 Ves., 219; Ware v. Horwood, 14 Ves., 28.

³ Peacock v. Evans, 16 Ves., 517; Gowland v. De Faria, 17 Ves., 23; Story's Eq., sec. 336.

⁴ Lord Hardwick, in Chesterfield v. Jansen, 2 Ves., 157; also, Earl of Aldoborough v. Frye, 7 Clark & Fin., 436.

⁵ Chesterfield v. Jansen, *ut supra*, King v. Hamlet, 2 M. & K., 480, 456.

is to come, the age of the heir expectant is not material.¹

Story, in his *Equity Jurisprudence*, says:² “The whole doctrine of equity, with respect to expectant heirs, reversioners, and others in like predicament, assumes that the one party is defenceless, and is exposed to the demands of the other under the pressure of necessity. It assumes, also, that there is a direct or implied fraud upon the parent or other ancestor, who, from ignorance of the transaction, is misled into a false confidence in the disposition of his property. Hence, it should seem that one material qualification of the doctrine is the existence of such ignorance” on the part of such parent or ancestor. “The other qualification of the doctrine is not less important. The contract must be made under the pressure of some necessity: for the main ground of the doctrine is the pressure upon the heir, or the distress of the party dealing with his expectancies, who is therefore under strong temptations to make undue sacrifices of his future interests.”³ The presumption seems to be stronger in favor of young heirs than it is of reversioners, remaindermen, etc. It is said that the authorities will not warrant a strict application of the foregoing rules to any class of reversioners except those who combine

¹ *Evans v. Cheshire*, Belt's Supp., 305; *Addis v. Campbell*, 4 Beav., 401; *Davis v. Duke of Marlborough*, 2 Wils., 146; *Ormond v. Fitzroy*, 3 P. Wm., 131; *Wiseman v. Beake*, 2 Vern. R., 121.

² Story's Eq., sec. 339, note (2); see remarks of Lord Brougham, in the case of *King v. Hamlet*, 2 Mylne & Keen., 473, 474, and S. C., 4 Sim. R., 185.

the character of heir.¹ It will be found on examination, that the principal difference consists in the proof required. If the reversioner or remainderman or any other in like predicament, makes out by evidence what the court presumes in favor of the heir, he will be entitled to relief. Courts of equity are jealous of the rights of this class; and extend to them an anxious protection. An examination of the cases will show that whenever it clearly appears that advantage has been taken of the pressure of necessity, or when fraud has in any degree been practiced, relief will be granted.²

The relief which equity grants in these cases is upon condition that the principal and interest be paid back by the heir or other, seeking relief; the defendant being considered as mortgagee. The plaintiff seeking equity must do equity by paying back what was lent.³

2. WHEN THE ACQUISITION OF THE LEGAL ESTATE IN PROPERTY IS TAINTED WITH ACTUAL FRAUD.

1. WHEN THE TRANSACTION IS IN FRAUD OF THE RIGHTS OF THE PARTIES THERETO.

In general, it will make no difference whether the deception, practiced upon a party by which he has

¹ Hill on Trustees, 153.

² Hill on Trustees, 153, and authorities cited, as *Wiseman v. Beake*, 2 Vern., 121; *Cole v. Gibbons*, 3 P. Wm., 290; 1 Sugd. V. and P., 165; *Barnadiston v. Lingwood*, 2 Atk., 133; *Bowers v. Haps*, 3 V. and B., 117; *Davis v. Duke of Marlborough*, 2 Sw., 140, note; *Addis v. Campbell*. 4 Beav., 401; Fonbl. Eq., B. 1, chap. 2, sec. 12, note (k).

³ Willard's Eq., 170; 1 Fonbl. Eq., B. 1, chap. 2, sec. 13.

been induced to part with his property, is brought about by positive misrepresentation, or by a wilful concealment of the facts. The gist of the fraud is, that deception has been wilfully practiced by which a party has been defrauded of his legal rights.¹ When a party bargains to dispose of his property to another, he is supposed to act with a full knowledge of all the facts; and consequently to understand the situation in which he places himself, by the transaction. He is bound to act in good faith with respect to the rights of him with whom he bargains; and he has a good right to expect good faith in return. If he possess any knowledge which the law deems essential to a fair understanding of the transaction, and which it is to be presumed the other party, exercising ordinary prudence, diligence and sagacity, does not possess, fair dealing requires that he should make it known to the other party; and if he fails to do so, he is presumed to have fraudulently intended it, and is deemed guilty of suppressing the truth—*suppressio veri*—for a fraudulent purpose, and equity punishes him by converting him into a trustee for the defrauded party, and will decree an execution of the trust, by ordering the instrument to be cancelled, or property re-conveyed, and the party restored to his original rights.²

¹ *Jarvis v. Duke*, 1 Vern., 19; *Broderick v. Broderick*, 1 P. Wm., 239; *Smith v. Richards*, 13 Peters, 26; *Torrey v. Buck*, 1 Green's Ch., 366; *Hoitt v. Holcomb*, 3 Foster, 535; *Wheaton v. Baker*, 14 Barb., 594; *Crayton v. Munger*, 9 Texas, 285.

² Story's Eq., sec. 187; *Middleton v. Middleton*, 1 Jac. & Walk., 96; Lord Waltham's case, cited 11 Ves., 638; 1 Fonbl. Eq., B. 1, chap. 2; 1 Mad. Ch. Pr., 348; *Boyce v. Grundy*, 3 Pet. U. S., 210; *Lewis v. McLemore*,

Actual fraud is where there is an intent to commit a cheat or deceit upon another, and includes all acts, omissions and concealments by which an undue and unconscientious advantage is taken of another.¹ Thus, where a party has been entrapped into the execution of an instrument through a conspiracy, or where by surprise, oppression, or by any other means, he has been led to do that which, free from constraint, and with a full understanding, he would not have done, equity will interpose to give him relief.²

As the ground for relieving against fraud is, that the party has been misled and injured by it, it is therefore necessary that it should be made to appear to the court, that the misrepresentation was a matter important to the interests of the other party, and that he was misled thereby. For if the misrepresentation was of something wholly immaterial, or which was as well known to the one party as to the other, or if it was a matter of opinion or fact, equally open to the inquiries of both parties, and, in respect to which, neither could be presumed to have trusted the other, there would be no cause for

10 Yerg., 206; *Mitchel v. Timmerman*, 4 Texas, 75; *Spencer v. Duren*, 3 Alab., 251; *Pitts v. Cottingham*, 9 Porter, 675; *Tyler v. Black*, 13 How. U. S., 231; *Franklin Bank v. Cooper*, 39 Maine, 542; but see *Harris v. Tyson*, 24 Penn. S. R., 217; *Webster v. Wise*, 1 Paige, 319; *Livingston v. Peru Iron Co.*, 2 Paige, 390; *Veeder v. Fonda*, 3 Paige, 94.

¹ Story's Eq., sec. 187; 1 Fonbl. Eq., B. 1, chap. 2, sec. 3, note (r); *Gale v. Gale*, 19 Barbour, 251.

² *Willan v. Willan*, 16 Ves., 82; *Howe v. Weldon*, 2 Ves., 517; *Bridgman v. Green*, 2 Ves., 627; *Neville v. Wilkinson*, 1 Bro. C. C., 546; *Mathew v. Hanbury*, 2 Vern., 187.

relief.¹ But where the party intentionally misrepresents a material fact, and thus produces a false impression in order to mislead the other, that he may obtain an undue advantage of him, he is guilty of a positive fraud, and will not be allowed to retain the advantage thus obtained.² And this misrepresentation may be by deeds or acts, as well as words. Artifices may mislead as well as positive assertions.³ And it may be as much by suppressing the truth, which good faith requires to be stated, as by making false statements.⁴ And it is wholly immaterial whether the party thus misrepresenting a material fact by false statements knew it to be false or not, for he assumed to know when he made the affirmation, and thus was morally guilty; and he shall make his assertions good, for it operates as an imposition on the other party.⁵

Pothier expounds this subject thus "As a matter of conscience any deviation from the most exact and scrupulous sincerity is repugnant to the good faith which ought to prevail in contracts. Any dissimu-

¹ Story's Eq., sec. 191; 2 Kent's Com., sec. 39, p. 484; *Neville v. Wilkinson*, 1 Bro. Ch. R., 546; *Hough v. Richardson*, 3 Story's R., 659; *Atwood v. Small*, 6 Clark & Finnell, 232, 395.

² *Laidlow v. Organ*, 2 Wheat. R., 178, 195; *Pidcock v. Bishop*, 3 B. & Cressw., 605; *Evans v. Bicknell*, 6 Ves., 173, 182; *The State v. Holloway*, 8 Blackf., 45; *Atwood v. Small*, *ut supra*.

³ 3 Black. Com., 165; 2 Kent's Com., sec. 39, p. 484, (2d ed.).

⁴ *Jarvis v. Duke*, 1 Vern., 19; *Broderick v. Broderick*, 1 P. Wm., 239; *Smith v. Richards*, 13 Peters R., 26.

⁵ *Ainslie v. Mendlycott*, 9 Ves., 21; *Smith v. Mitchell*, 6 Georgia R., 458; *Hazzard v. Irwin*, 18 Pick., 85; *Hammat v. Emerson*, 27 Main, 308; *Dagget v. Emerson*, 3 Story C. C., 733; *Foster v. Charles*, 6 Bing. R., 396; S. C., 7 Bing., 105; *Pearson v. Morgan*, 2 Bro. Ch. R., 389; *Burrows v. Locke*, 10 Ves., 475.

lation concerning the object of the contract, and what the opposite party has an interest in knowing, is contrary to that good faith, for since we are commanded to love our neighbor as ourselves, we are not permitted to conceal from him any thing which we should be unwilling to have concealed from ourselves under like circumstances. But in civil tribunals a person cannot be allowed to complain of trifling deviations from good faith in the party with whom he deals. Nothing but what is plainly injurious to good faith ought to be considered as a fraud sufficient to impeach a contract.¹

There are two methods of practicing deception amounting to fraud, in contracting with others.

1st. *Suggestio falsi*—by false statements, and

2d. *Suppressio veri*—by wilful concealments.

1. *By False Statements of Material Facts, by which the Contracting Party is misled.*

But it is held that these false statements extend to acts and artifices by which the other party is misled and entrapped.² Thus, a will was defectively executed, and the devisee, for the purpose of procuring the heir to convey the devised estate to him for a small consideration, represented to the heir that the will was properly executed. This was held

¹ 1 Pothier on Oblig., by Evans, p. 19, note (30); Cod. Lib. 2, tit. 21, 1, 6; Story's Eq., sec. 194; see *Jackson v. Crafts*, 18 Johns., 110.

² Story's Eq., sec. 192; Black. Com., 165; 2 Kent's Com., 39, Lecture, p. 484, (2d edit.); *Chisholm v. Gadsden*, 1 Strobh., 220; *Chesterfield v. Jansen*, 2 Ves., 155; see Chancellor Thurlow's remarks in case of *Neville v. Wilkinson*, 1 Bro. Ch. R., 546.

to be a fraud upon the heir, and the conveyance was set aside.¹ An executor represented to a legatee that she had no legacy, and thereby procured a release from her; the release was set aside for fraud.² Any false and fraudulent representations by which it shall appear that the party has been misled and injured, will be sufficient to vitiate the contract.³ And where the fraudulent representation applies to only a part of the transaction, the party affected with the fraud cannot support the transaction as to the remaining part, for the fraud vitiates the whole contract.⁴ When the false statement is also connected with a gross suppression of the truth, it will take less of false affirmation to establish the fraud than where there had been no such suppression. In the case of *Turner v. Harvey*,⁵ Lord Eldon said, "that although the purchaser is not bound to give the vendor information as to the value of the property, yet if a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate.⁵ Where the party who has been guilty of fraudulent representation is the one who is seeking the aid of the court for the enforcement of the agreement thus

¹ *Broderick v. Broderick*, 1 P. Wm., 239.

² *Jarvis v. Duke*, 1 Vern., 19; see *James v. Greaves*, 2 P. Wm., 270; *Horseley v. Chaloner*, 2 Ves., 83.

³ See *Phillips v. Duke of Bucks*, 1 Vern., 227; 1 Sug. V. & P., 211; *Fellows v. Ld. Gwydyr*, 1 Sim. 63; S. C., 1 R. & M., 83; *Wilson v. Force*, 6 Johns., 110.

⁴ *Clermont v. Tasburgh*, 1 I. & W., 120; *Wilson v. Force*, 6 Johns., 110.

⁵ Jac. 178; *Fox v. Macreth*, 2 Bro. C. C., 420; 1 Sug. V. & P., 6; *Hill on Trustees*, 147.

obtained, very slight proof of improper conduct will be sufficient for the court to refuse its aid.¹ But it is otherwise when the other party asks the court to interfere against the legal and equitable rights of a party claiming under a deed or other instrument. In such cases, a much stronger case must be made out. The facts and circumstances must be such as to leave no question of the fraud.²

The same general principles apply, whether the fraud was perpetrated by the party in interest or by an agent acting in his behalf, if the act be adopted by the principal.³

2. *Fraud perpetrated by the Suppression of the Truth by which a Party is misled and injured in his Rights and Interests.*

To entitle one to relief in such a case, the suppression of facts must be such as the one party under the circumstances is bound in duty and conscience to disclose to the other, and in respect to which he cannot innocently remain silent.⁴ Says Justice Story,⁵ the true definition of an undue concealment which amounts to a fraud in a court of equity, and for which it will grant relief, is the

¹ Hill on Trustees, 147.

² William v. William, 16 Ves., 83; Cadman v. Homer, 18 Ves., 10; Mortlock v. Baller, 10 Ves., 292.

³ Story's Eq., sec. 193, a; Fitzsimmons v. Joslin, 21 Verm. R., 129.

⁴ Irvine v. Kirkpatrick, 3 Eng. L. & Eq. R., 17; Jusan v. Toulmin, 9 Alab., 662; Story's Eq., sec. 204; 2 Kent's Comm., sec. 39, p. 490, (4th edit.); Parker v. Grant, 1 Johns. Ch. R., 630.

⁵ Equity Jurisp., sec. 207; Fox v. Macrath, 2 Bro. Ch. R., 420; Pearson v. Morgan, 2 Bro. Ch. R., 390; Flemming v. Slocum, 18 Johns., 403.

non-disclosure of those facts and circumstances which the party is under some legal and equitable obligation to communicate to the other, and which the latter has a right, not merely *in foro conscientiæ*, but *juris de jure* to know.”¹ This definition is far from furnishing the means by which the legal and equitable obligation to disclose a fact, unknown to the other party, may be ascertained. There are many cases where the obligation to disclose is imperative. Thus, if a vendor should sell an estate knowing that he had no title to it, or knowing that there were incumbrances on it of which the vendee was ignorant,² or where the vendor should sell a house situate in a distant town, which he knew to be burnt down, and of which fact the vendee was ignorant,³ or where a party negotiating for the purchase of a reversion after the determination of two estates for life, knew of the death of one of the tenants, of which fact the other party was ignorant,⁴ or where, in a partnership, a managing partner, having knowledge of the accounts and of the value of his co-partner’s share, purchased it for an inadequate price without communicating to his partner, the proper information.⁵ On the other hand, there may be cases where the facts are material, and unknown to one party and known to the other; and they may be such as are not equally

¹ See preceding note.

² Story’s Eq., sec. 208; *Arnot v. Bisco*, 1 Ves., 95, 96.

³ Story’s Eq., sec. 209.

⁴ *Turner v. Harvey*, Jac. 169.

⁵ *Maddeford v. Austwick*, 1 Sim., 89; S. C. on appl., M. & K., 279.

accessible; or at the moment, within the reach of both parties; and yet contracts founded on such ignorance on one hand, and knowledge on the other, may be completely obligatory.¹ It has been found to be very difficult to define within what limits a concealment of material facts will be deemed fraudulent. It would seem, from an examination of the cases, that a distinction should be taken between intrinsic and extrinsic circumstances. Justice Story defines intrinsic circumstances to be such as belong to the nature, character, condition, title, safety, use or enjoyment of the subject matter of the contract; such as natural and artificial defects of the subject matter; and he defines extrinsic circumstances to be those which are accidentally connected with it, or rather bear upon it, at the time of the contract, and may enhance or diminish its price or value, or operate as a motive to make or decline a contract; such as facts respecting the occurrence of peace or war, the rise or fall of markets, the character of the neighborhood, the increase or diminution of duties, or the like circumstances.² The maxim of the common law, *caveat emptor*, requires the purchaser of goods and chattels to be on his guard; and to look into the character and quality of that which he purchases for himself. If he has not the necessary knowledge and judgment to fit him for a purchaser in market, he must employ some one to assist or act for him.

¹ Story's Eq., sec. 207; Fox v. Mackreth, 2 Bro. Ch. R., 420; Turner v. Harvey, Jacob. R., 178; Story's Eq., sec. 147, 148; Harris v. Tyson, 24 Penn. St., 359.

² Story's Eq., sec. 210.

And, beside, if he doubt the character, condition or quality of that which becomes the subject matter of the contract or purchase, he is at liberty to question the vendor or other party, and require such information as will compel the party to disclose any defects in quality, character or condition which may be within his knowledge, and not apparent on careful examination. Thus, the vendee, if he exercise a proper degree of diligence, may guard against deception. But if he trust to his own judgment and sagacity, without demanding any warranty or other information respecting the quality, etc., of the article, and if there be no artifice, misrepresentation or deception practiced by the seller, he buys at his peril. For, the common law, very reasonably, requires the purchaser to attend, when he makes his contract, to those qualities of the article he buys, which are supposed to be within the reach of his observation and judgment, and which it is equally his interest and duty to exert.¹

In such cases the vendee is understood to be bound by the sale, notwithstanding there may be intrinsic defects and vices in the quality, known to the vendor and unknown to the vendee, which materially affect its value.² The same maxim is applicable in equity as at law. Its application is relaxed only when there are circumstances of peculiar trust, confidence or relation between the parties.³

¹ 2 Kent's Com., sec. 39. p. 478; *Seixas v. Wood*, 2 Caine's R., 48; *Welsh v. Carter*, 1 Wend. R., 185; *Sweet v. Colgate*, 20 Johns. R., 196; *Story's Eq.*, sec. 212; 2 Black. Com., 451.

² *Story's Eq.*, sec. 212.

³ *Story's Eq.*, sec. 213; see *Martin v. Morgan*, Brod. & Bing. R., 289.

It would seem that in all cases where the concealment of intrinsic circumstances from the other party is deemed fraudulent, there is a breach of trust or confidence necessarily imposed; where the very silence of the party implies a direct affirmation, and it is deemed equivalent to it.¹ The relation of the parties may be such, that one party may legally expect good faith on the part of the other. Thus, in the sale of a ship which had latent defects known to the seller, but which the buyer could not by any attention possibly discover, it was held that the seller was bound to disclose, and the concealment was deemed a breach of good faith.² Where the silence is equivalent to artifice, and tends to throw the buyer off his guard, it is deemed fraudulent. Thus, where a vendor, knowing of an incumbrance upon an estate, and knowing that the purchaser is ignorant of it, sells without disclosing the fact, and also under representations inducing him to buy, he acts fraudulently.³

The like confidence is violated where a party, taking a guaranty from a surety, conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions, as to the real state of the case. The omission to inform him of such circumstances is deemed fraudulent, and vitiates the guaranty.⁴ Or where a party,

¹ Story's Eq., sec. 214; 2 Kent's Comm., sec. 39, p. 483, and note on 488.

² *Mullish v. Motteux*, Peak's Cases, 115; see *Baglehole v. Walters*, 3 Campb. R., 154, and *Pickering v. Dowson*, 4 Taunt. R., 779.

³ 1 Ves., 96.

⁴ Story's Eq., sec. 215, and authorities; *Pidcock v. Bishop*, 3 B. & C., 605; *Evans v. Kneeland*, 9 Alab. R., 42; *Veeder v. Fonda*, 3 Paige, 94.

knowing his clerk to be dishonest, applies for security in such a manner, and under such circumstances, as holds the clerk out before the world as honest and trustworthy.¹ Thus, in proportion as the relation of the parties approaches that which becomes confidential, does the law require the practice of the utmost good faith. Under such circumstances, any concealment of material facts, by which the other party is known to be misled, or to act unadvisedly, will vitiate the transaction. Thus the relation of attorney and client, principal and agent, principal and surety, landlord and tenant, parent and child, guardian and ward, trustee and beneficiary, etc., are relations of such trust and confidence that the utmost good faith is required.²

In the mercantile and commercial world, the relation of buyer and seller is one of antagonism of interest; it is expected that each will seek to make the best bargain possible for his own interest; and they enter the field of speculation with such expectations. The law, therefore, says to them, *caveat emptor*; and it will not aid them if they disregard the injunction. It will hold them to their words, and to the natural interpretation of their actions. They must not misrepresent any thing material; and they must use no artifice of any kind for concealment. But beyond this, it says, CAVEAT EMPTOR.

¹ Story's Eq., sec. 215.

² Story's Eq., sec. 218; see also *Whelen v. Whelen*, 3 Cow., 537; *Wendell v. Van Rensselaer*, 1 Johns. Ch., 344; *Brice v. Brice*, 5 Barb., 533; *Sears v. Shaffer*, 1 Barb., 408; *Bacon v. Bronson*, 7 Johns. Ch., 194.

3. *Contracts with Idiots and Insane persons.*

There is still another class of cases, deemed fraudulent, as affecting the rights of parties thereto; contracts with idiots and insane persons; or persons who by law are deemed incompetent to contract, because they have not a sufficient use of their rational faculties. The general maxim of the law, regarding the power to make contracts and perform other acts affecting the rights and interests of the parties, is, that there must be a free and full consent in order to bind the parties. Consent is deemed an act of reason, accompanied with deliberation, the mind weighing as in a balance, the good and evil on each side.¹ Puffendorf remarks that every true consent, implies a physical power, a moral power, and a serious and free use of them.² Therefore when this consent is not intelligent and free, it does not constitute a perfect obligation. Thus if it is obtained by imposition, circumvention, surprise, undue influence, it is not a deliberate and free act of the mind. Hence, idiots and insane persons are incapable of giving such an assent, and therefore cannot make valid contracts.³ But the ground upon which equity interferes to set aside such contracts, is that of fraud.⁴ For if persons, knowing their incapacity, deal with them, they are deemed to have perpetrated a meditated fraud upon their rights.⁵ But

¹ Story's Eq., sec. 222; 1 Fonbl. Eq., B. 1, chap. 2, sec. 3; Willard's Eq., 194; 2 Kent's Com., 450.

² Law of Nat. and Nations, B. 3, chap. 6, sec. 3; Barbeyrac's note (1).

³ See ante page, 155.

⁴ Story's Eq., sec. 229.

⁵ Story's Eq., sec. 229; Willard's Eq., 197, 198, 199.

where the party, dealing with one who is a fit subject for a commission, is ignorant of his state, and the transaction is fair, that is free from any taint of fraud, equity will not interfere, especially where the parties cannot be reinstated.¹ Relief in equity, in such cases, depends very much upon circumstances which mark each particular case.¹ Courts of equity are exceeding jealous of the rights of persons who are deemed *non compos*, and they watch with great vigilance every attempt at dealing with them. Where, from the nature of the transaction, there is not evidence of the most perfect good faith, or where the contract does not seem perfectly just in itself, or for the benefit of such persons, equity will grant relief.² Where fines have been levied, and recoveries have been suffered by such persons, equity will go all necessary lengths to grant relief. It will not declare them void and vacate them; but it will decree a reconveyance, of the estate, and will hold the conusee or demandant to be trustee for the suffering party.³

4. *Infants or Persons of non-age.*

Infants are by law generally treated as persons having no capacity to make contracts, or to bind themselves, from the want of sufficient understand-

¹ Neill *v.* Morley, 9 Ves., 478; Story's Eq., sec. 228; Sergeson *v.* Sealey, 2 Atk., 412; Carr *v.* Holliday, 5 Iredell's Eq. R., 167.

² Selby *v.* Jackson, 13 Law J. Rep., (N. S.), chap. 249; Story's Eq., sec. 228.

³ Story's Eq., sec. 229; Addison *v.* Dawson, 2 Vern., 678; Welby *v.* Welby, Tothill R., 164; Wilkinson *v.* Brayfield, 2 Vern., 307; Clark *v.* Ward, Preced. Chan., 150; Ferris *v.* Ferris, 2 Eq. Abriqt., 695; Hill on Trustees, 154, and authorities cited.

ing or discernment. They are placed in the category of persons *non compos* in many respects,¹ and the necessity for guardians results from their inability to take care of themselves. This inability is a presumption of the law in favor of the infant, and admits of no rebutting evidence.

Most of the acts of infants are only voidable, and not absolutely void; and may be affirmed or avoided when he arrives of age. There has been much discussion of the question, what of the infant's acts were absolutely void and what voidable only. In the case of *Keane v. Boycott*,² Lord Chief Justice Eyre undertook to reconcile the doctrine of void and voidable contracts on this ground: His Lordship said, that when the court could pronounce the contract to be to the infant's prejudice, it was void; and when to his benefit, as for necessities, it was good; and when it was of an uncertain nature as to benefit or prejudice, it was voidable.³ Justice Story³ says, where the contract can never be for the benefit of the infant, it is void utterly. And that in respect to the acts of infants of a more solemn nature, such as deeds, gifts, grants, and such as take effect by delivery of his hand are voidable, but such as do not so take effect are void.⁴ As to the time when

¹ 1 Fonbl. Eq., B. 1, chap. 2; see 4 Willard's Eq.; Story's Eq., sec. 240, 242; *Hamilton v. Lomax*, 26 Barb., 615.

² 2 H. Black. R., 511; *McGan v. Marshall*, 7 Humph., 121; 2 Kent's Com., 236; see Justice Story's remarks in 1 Mason's Rep., 82; *Wheaton v. East*, 5 Yerger, R., 41; *McMinn v. Richmonds*, 6 *ibid.*, 1.

³ Story's Eq., sec. 241; 1 Fonbl. Eq., B. 1, chap. 2, sec. 4, note (y) (z) (b); *Touch v. Parsons*, 3 Burr., 1801, 1807; 1 Amer. Lead. Cases.

⁴ *Touch v. Parsons*, 3 Burr. R., 1794; *Perkins*, sec. 12; *Conroe v. Bird-sall*, 1 Johns. C., 127.

infants may avoid their contracts or deeds: some may be avoided during infancy, others not until full age. It is said that the infant's privilege of avoiding acts which are matters of record, as fines, recoveries and recognizances, is limited to his minority, when his non-age can be tried by the court, by inspection; but that deeds, writings and parol contracts may be avoided during infancy, or after he is of age, by his dissent, entry or plea, as the case may require.¹ In the case of *Ross v. Stafford*,² Chancellor Jones held that an infant might avoid a sale of chattels while under age, but not a sale of land. In the latter case he could enter and take the profits until of age. But where the possession was changed, and he had no legal means to regain it, he might exercise the power of rescision immediately. That the act of avoidance was allowed during infancy, only when necessary; inasmuch as the infant lacked discretion to exercise it. That the infant might avoid the sale of chattels during infancy, and bring trover by his guardian, to recover them.²

As to the mode of affirmance or disaffirmance of those acts, deeds or contracts of the infant which are voidable after arriving at full age, there has been much conflict of authority, one class of decisions holding that the infant, on coming of age, if he would avoid his contract, deed, &c., is bound within

¹ 2 Kent's Com., 237; Coke Litt., 380 (b); Com. Dig. tit. *enfan.*, c. 3, 5, 9, 11.

² 9 Cowen's R., 626; *Bool v. Mix*, 17 Wend., 119; *Cummings v. Powell*, 8 Texas, 80.

a reasonable time to give notice thereof.¹ The other class insisting that the infant becomes bound, after becoming of age, only by reason of acts or circumstances amounting to an affirmance.² The former is probably the English doctrine; the latter the American. The current of American decisions holds the doctrine that the contracts of the infant are not binding unless there be some act on his part affirming the same after arriving at full age. Much, however, will depend upon circumstances, such as the nature of the contract, and the situation of the infant, whether any overt act of assent or dissent on his part will be necessary.³ Where the equity is strong against the disaffirmance, very slight acts on the part of the infant after coming of age would fix his responsibility; but where the equity was strong the other way, acts amounting to a clear, intelligible and intentional affirmation would probably be required.⁴

5. *Surprise.*

That surprise which will avoid a deed must be produced or accompanied with fraud and circumven-

¹ *Holmes v. Blogg*, 8 Taunt. R., 35; *Kline v. Beebe*, 6 Conn. R., 494; *Richardson v. Boright*, 9 Verm. R., 368; *Hoit v. Underhill*, 9 N. H. Rep., 439; *Moore v. Abernathy*, 7 Blackf. R., 442; *Cressenger v. Welch*, 15 Ohio R., 156; *Dublin & Wicklow R. Co. v. Black*, 15 Eng. L. & Eq. R., 556.

² *Evelyn v. Chichister*, 3 Burr. R., 1717; *Hubbard v. Cummings*, 1 Greenl. R., 11; *Aldrich v. Grimes*, 10 N. H. Rep., 194; 4 Pick. Rep. 48; *Lessee of Drake v. Ramsay*, 5 Ham. Ohio, 251; *Jackson v. Carpenter*, 11 Johns. Rep., 539.

³ 2 Kent's Com., 239.

⁴ *Hinely v. Margaritz*, 3 Barr. R., 428; *Norris v. Vance*, 3 Rich. R., 164; *Smith v. Kelley*, 13 Met. R., 309.

tion.¹ The party, before he can claim relief on the ground of surprise, must show, from the facts and circumstances, that he had no opportunity for exercising that deliberation necessary for giving a valid assent. That he was under pressure of circumstances, and that proper time was not allowed him. That the importunity of those in whom he placed confidence was exceedingly pressing. That he was not aware of the consequences, being so suddenly drawn into the act, and having no time to consult counsel or friends. These, or the like considerations being fully established, if it shall appear to the court that great injustice has been done, or that there is great inequality in the bargain, equity will grant relief.² Relief is granted in these cases upon the ground of fraud in one party and mistake in the other. For where a party is taken by surprise, and has no time for the exercise of judgment or deliberation, and the other party takes advantage of that surprise, knowing him to be acting without deliberation, without the counsel of friends, and without time to calculate consequences, he is deemed guilty of fraud, and equity will punish him by converting him into a trustee.³ As full assent is essential to a valid agreement, where that is prevented by surprise, and without any fault of the party, it would seem to be a fit case for equitable relief.³

¹ Fonbl. Eq., B. 1, chap. 2, sec. 8; 1 Mad. Ch. Pr., 212, 213, 214.

² *Evans v. Llewellyn*, 1 Cox R., 439, 440; S. C., 1 Bro. Ch. R., 150; *Irnham v. Child*, 1 Bro. Ch. R., 92; *Picket v. Loggon*, 14 Ves., 215; *Townshend v. Stangroom*, 6 Ves., 388; *Story's Eq.*, sec. 251; *Turning v. Morrison*, 2 Bro. C. C., 326; *Mortlock v. Buller*, 10 Ves., 301.

³ *Marquis of Townshend v. Stangroom*, 6 Ves., 339; *Pickett v. Lagoon*, 14 Ves., 215; *Willard's Eq.*, 206.

2. WHEN THE ACT IS IN FRAUD OF THE RIGHTS OF THIRD PARTIES.

1. *Fraud in the procurement or suppression of Deeds, Wills, &c.*

It is laid down as a general rule that equity will not relieve in cases of fraud in the *procurement* of wills, because there is an adequate remedy at law.¹ In England, if the will be of personal estate, the remedy is in the Ecclesiastical court; and if of real estate, it may be set aside at law. Objections of this kind should be settled at the time of probate. Inasmuch as the will has no recognized validity until after probate, and that which tends to impeach it is admissible as evidence at that time, courts of equity have usually declined to take jurisdiction, upon the principle that the parties have an adequate remedy at law.² There may be cases, however, when the remedy at law not being adequate, chancery will take jurisdiction. Thus, where the executor, who prepared the will of the testator, was a lawyer, and did not inform him of that rule of interpretation by which the executor was allowed to claim and hold so much of the personal estate as was left undisposed of by the will, and it appearing to the court that it was not the intention of the testator that the executor should take any benefit under the will, he was not allowed to profit by the omis-

¹ Story's Eq., sec. 184, and see note to (7 ed.).

² Kenrich v. Bransby, 3 Bro. P. C., 358; Allen v. McPherson, 5 Beav., 469; 1 Phill. Ch. R., 133; Colton v. Ross, 2 Paige, 396; Clark v. Fisher, 1 Paige, 171; Bowen v. Idley, 6 Paige, 46.

sion, but was decreed to be a trustee for the next of kin.¹ So likewise where the drawer of a will fraudulently inserted his own name instead of the name of the legatee, there being no adequate remedy at law, chancery has interfered and declared a trust.² This question has been much discussed both in England and America, and the current of decisions is adverse to the jurisdiction of courts of equity in cases of fraudulent *procurement* of wills, upon the sole ground that there is an adequate remedy at law. It therefore, would seem to follow, that in all cases where the remedy at law is grossly inadequate, in such cases, equity might give relief. Mr. Willard, in his *Equity Jurisprudence*,³ remarks, that though equity will not set aside a will as obtained by fraud after it has been admitted to probate, it has been held that equity will declare a trust upon a will in case of a notorious fraud upon a legatee; and where the drawer of a will should insert his own name instead of the name of a legatee, &c. In such case the person whose name is so inserted by fraud, is held to be trustee of the real legatee.³

But fraud on the part of an heir or other person in destroying a will, deed, or other instrument, through which a third party is to derive title, comes within the scope of equitable relief. Thus, if an heir

¹ *Seagrave v. Kirwin*, 1 Beat., 157; *Kennel v. Abbott*, 4 Ves., 802; *Podmore v. Gunning*, 7 Sim., 744; see also *Brady v. McCosker*, 1 Comst., 214; *Clark v. Sawyer*, 2 Comst., 498.

² *Kennell v. Abbott*, 4 Ves., 802.

³ *Willard's Eq.*, p. 146; *Marriot v. Marriot*, 1 Str., 667; *Gains and wife v. Chew*, 2 How. S. C. R., 619, 645; *Traver v. Traver*, 9 Pet., 180; *Hoge v. Hoge*, 1 Watts, 213.

should suppress a will or deed to prevent a devisee or grantee from obtaining an estate thereby vested in him, a court of equity would grant relief and perpetuate the possession and enjoyment of such estate in the devisee or grantee.¹

In the case of *Morey v. Herrick*,² Bell, J., in giving the decision, said, "It is well settled that if one be induced to confide in the promise of another that he will hold in trust, or that he will so purchase for one or both, and is thus led to do what he otherwise would have forborne, or to forbear to do what he had contemplated in the acquisition of an estate, whereby the promisor becomes the holder of the legal title, an attempted denial of the confidence is such a fraud as will operate to convert the purchaser into a trustee." The trust in these cases is raised *ex maleficio*, and is not so much because of the fraud in the *original acquisition* of the property as in the subsequent refusal to execute the trust.

This principle is further illustrated in the case of *Hoge v. Hoge*,³ in which one William Hoge, by his will had devised, among other legacies, one undivided third of a large tract of land to his brother John Hoge, without making any declaration of the

¹ Story's Eq., sec. 254, and he cites 1 Fonbl. Eq., B. 1, chap. 2, sec. 3, note (u); *Hunt v. Matthews*, 1 Ves. R., 408; *Wardour v. Binsford*, 1 Vern. R., 452; *Dalton v. Coalsworth*, 1 Pr. Wm., 731; *Tucker v. Phipps*, 3 Atk., 360; *Hampden v. Hampden*, 1 Bro. P. C., 250.

² *Morey v. Herrick*, 18 Penn. St. R., 128.

³ *Hoge v. Hoge*, 1 Watts, 213; *Dixson v. Olmuis*, 1 Cox. Ch. Ca., 414; *Harris v. Horwell*, Gilb. Eq. Rep., 11; *Chamberlaine v. Chamberlain*, 2 Freem., 34; *Devenish v. Baines' Prec. Ch.*, 3; *Oldham v. Litchfield*, 2 Vern., 506; *Thynn v. Thynn*, 1 Vern., 296.

trust. But at the time of the drawing of the will, the testator told the scrivener that the land devised to his brother John was in trust, but did not declare who was the beneficiary. He said there was no other way of doing it, and he must leave it entirely to his brother's honor, and he had full confidence in him. The scrivener also testified that on the day the testator was buried he spoke to John Hoge, the devisee, about the devise to him, and informed him what the testator said about it at the time the will was drawn. And John replied it was for young William Hoge, an illegitimate son of the testator, and said he had been a long time trying to get his brother, the testator, to do it; but he had not the courage; and he also spoke of the difficulties made by his brother when he proposed it. Other evidence was given tending to establish the same fact as to the trust. Suit was brought by young William to recover the land devised to John, and the defendant's claimed under a deed from John, and denied the trust.

Gibson, J., in giving the decision of the court, remarked, "Cotemporary declarations of a testator have always been not only competent, but powerful evidence of the fact declared: and the competency of declarations by the devisee while he was the owner of the land will not be disputed. Indeed, the objection is rather to the fact itself than to the evidence of it. And it is contended that parol evidence of a trust is contrary to our Statute of Wills, which corresponds, as far as regards the point in dispute, with the British Statute of Frauds. Un-

doubtedly every part of a will must be in writing and a naked parol declaration of a trust in respect to land devised is void. The trust insisted on, however, owes its validity, not to the will or the declaration of the testator; but to the fraud of the devisee. It belongs to a class in which the trust arises *ex maleficio*, and in which equity turns the fraudulent procurer of the legal title into a trustee, to get at him; and there is nothing in reason or authority to forbid the raising of such a trust from the surreptitious procurement of a devisee.¹

In cases of this character when the trust is raised *ex maleficio*, it is legitimately within the province of equity to grant relief. The *cestui que trust* did not wish to impeach the will, or in any manner to invalidate it. His claim depended upon maintaining its validity. He asked that the trust should be executed according to the intention of the testator; and he had no adequate remedy at law.

The principle is well settled, that parol proof is admissible to establish a trust in certain cases where the deed is absolute upon its face. Thus in the case of *Ambrose v. Ambrose*,² where real estate was purchased in the name of another person, without any trust being expressed at the time; and the purchaser, having devised the estate, died. After his death the trustee declared that he held in trust for the purchaser. This was held to be good evidence of the trust; and the devisee who claimed the estate, held

¹ See preceding note.

² 1 Pr. Wm., 323; see also *Wilson v. Dent*, 3 Sim., 385; *Gardner v. Rowe*, 2 S. and St., 346; *Hoge v. Hoge*, 1 Watts, 213.

it against the widow who also claimed it by the custom of London. And upon a similar principle it is held, that a deed absolute upon its face, may be converted to a mortgage by parol testimony ; where the act and declaration are cotemporaneous with the execution of the instrument.¹ At law, such evidence might not be admissible ; but equity, acting upon the principle that the omission is the result of accident, mistake or fraud, admits parol proof.²

In the case of *Marriot v. Marriott*, mentioned in *Strange*, p. 666, and also in *Gibb. Rep.* 203, the case was compromised, and the judgment although written out, was not delivered. In that case the judge took the position, that a court of equity, might, according to the real intention of the testator, declare a trust upon a will although it be not contained in the will itself, in the three following cases : First, in a case of a notorious fraud upon a legatee ; as if the drawer of a will should insert his own name instead of the name of the legatee ;³ no doubt he would be a trustee for the real legatee. Secondly, where the words imply a trust for the relations, as in case of a specific devise to the executors, and no disposition of the residue.⁴ Thirdly, in case of a

¹ *Brown v. Lunt*, 37 Maine, 423 ; *McIntyre v. Humphries*, 1 Hoff. Ch. Rep., 31 ; *Marks v. Pell*, 1 John. Ch., 594 ; *Strong v. Stewart*, 4 J. Ch., 167 ; *Clark v. Henry*, 2 Cow., 324 ; *Whittick v. Kane*, 1 Paige, 202 ; *Van Buren v. Olmstead*, 5 Paige, 9 ; *Lansing v. Russell*, 3 Barb. Ch., 325 ; see also *Champlain v. Butler*, 18 Johns., 169 ; *Gilchrist v. Cunningham*, 8 Wend., 641 ; *Ryan v. Dox*, 25 Barb., 440.

² *Webb v. Rice*, 6 Hill, 219.

³ *Kennell v. Abbott*, 4 Ves., 802.

⁴ See unexhausted residuum, ante page.

legatee promising the testator to stand as a trustee for another,¹ and nobody has thought that declaring a trust in these cases, is an infringement upon the ecclesiastical jurisdiction; and, Mr. Story adds, in his note to § 184 of his Equity Jurisprudence, these positions do not admit of any dispute, for in none of these instances would the ecclesiastical court be competent to afford relief. From an examination of the conflicting decisions upon this subject, and the principles upon which they are based, it would seem that equity has jurisdiction in cases of fraud, accident and mistake, in the procuring and execution of wills as well as deeds, where the remedy at law is grossly inadequate.²

It is but a dictate of sound morality, that when A. for his own personal advantage, has injured B. by his false and fraudulent actions and representations, and has thus possessed himself of property of which he has deprived B., he shall not be permitted to enjoy the fruit of his wrong doing, neither shall B. be deprived of the advantage intended him; but justice shall be done by converting A. into a trustee for B., and compelling him to execute the trust. Thus, where an instrument is suppressed or destroyed by the defendant, equity will grant relief by converting him into a trustee if need be;³ or,

¹ See *Chamberlain v. Chamberlain*, 2 Freem., 34; *Goss v. Tracey*, 1 Pr. Wm., 288; *Thynn v. Thynn*, 1 Vern., 296; *Oldham v. Litchfield*, 2 Vern., 506.

² This subject is treated at length, and the conflicting authorities cited, in a note to section 184 Story's Eq. Jurisprudence; see also note and authorities cited in Hill on Trustees, p. 150.

³ *Mad. Ch. Pr.*, 424; *Bates v. Head*, Toth., 66.

where a will has been suppressed or destroyed by an executor for the purpose of defeating a legacy, the legatee may obtain a decree for payment against him.¹

It is the peculiar province of a court of equity to grant relief from the effect of spoliations and suppressions of instruments. And when the contents of an instrument thus repressed or destroyed can be ascertained, the party injured thereby will have the same benefits as though the instrument were produced.² Thus, where a will has been suppressed, and the proof of its contents could not be made out, the devisee was decreed to enter and enjoy, until the defendant produced the will, and until further order.³ So, also, where there was no evidence of a deed which a party confessed to have burned, he was ordered to be committed until he admitted the deed as stated in the bill.⁴ The principle is this: where the instrument is proved to have existed, or would have existed had it not been for the fraudulent conduct of the party, the court treat the instrument as actually executed and existing.⁵

So, also, if an heir or personal representative or devisee, whose interest would be prejudiced by the

¹ *Tucker v. Phipps*, 3 Atk., 360; *Hayne v. Hayne*, 1 Dick., 18; *Tucker v. Phipps*, 3 Atk. R., 360; and see *Story's Eq.* sec. 254, note (1), and the remarks of Lord Hardwick, there cited; *Brown v. Lynch*, 1 Paige, 147.

² *Story's Eq.*, sec. 254, and authorities cited; *Garterside v. Radcliffe*, 1 Ch. Ca., 292; *Hunt v. Matthews*, 1 Vern., 408.

³ *Hampden v. Hampden*, 1 P. Wm., 733.

⁴ *Sanson v. Rumsey*, 2 Vern., 561.

⁵ *Middleton v. Middleton*, 1 I. & W., 99; *Saltern z. Melhuish, Amb.*, 294; *Luttrell v. Waltham*, 14 Ves., 290.

insertion of a provision in a will in favor of some third person, induces the testator to omit such provision by assurances that his wishes shall be executed as though the provision were made, such assurances will raise a trust which will be enforced in equity, and such trust may be proved by parol.¹

2. *Fraud in regard to Powers of Appointment.*

The principle is this. A person having a power of appointment for the benefit of others shall not use it for his own benefit, if he does so, he is deemed guilty of fraud, and equity will hold him to an account as trustee to the extent of the benefit he derives therefrom. Thus, where a father had a power to appoint among his children, and made an illusory appointment, by giving to one child a nominal and not a substantial share, his conduct was deemed a fraud upon the power.² So also when a parent has power of appointment to such of his children as he may choose, shall not, by exercising it in favor of a child in a consumption gain the benefit thereof to himself; neither shall he, by secret agreement with a child in whose favor he makes it, derive a beneficial interest from the exercise of such power.³

¹ Gaither v. Gaither, 3 Md. Ch. Decis., 158.

² Sugd. on Pow., chap. 7, sec. 2, chap. —, sec. 4; Butcher v. Butcher, 9 Ves., 382; 1 Mad. Ch. Pr., 246 to 252.

³ Meyn v. Belcher, 1 Eden R., 138; McQueen v. Farquer, 11 Ves., 479; Palmer v. Wheeler, 2 Ball & Beatt., 18; Morris v. Clarkson, 1 Jac. & Walk., 111.

3. *Fraudulent Conveyances to Defeat Creditors.*

Where the conveyance is not absolutely void so as to confer no legal interest whatever, a trust will be raised in favor of the creditors, on proper application to the court. Such conveyances are usually altogether void at law, and consequently there is no legal estate upon which a trust can fasten. But where a debtor has compounded with his creditors, and one of them who has agreed to the arrangement enters into a secret arrangement with the debtor by which he obtains some additional property or advantage, the transaction will be deemed fraudulent, and he will hold such property in trust for the creditors.¹

4. *Devise or Conveyance to Trustees for Illegal Purposes.*

It is deemed to be a fraud upon the legislature to devise or convey property to trustees upon a secret understanding that the same is to be applied for purposes forbidden by law, and therefore the law will not permit such conveyances to take effect. It is also deemed to be a fraud upon the rights of those parties who would become entitled upon failure of the illegal gift. Upon this principle the heir at law filed a bill against a devisee, alleging the existence of such a trust, and the defendant was re-

¹ See *Chesterfield v. Jansen*, 2 Ves., 156; *ex parte Saddler & Jackson*, 15 Ves., 52; *Mann v. Darlington*, 15 Penn. St. R., 310; see *Trusts for benefit of creditors*, post; *Walcott v. Almy*, 6 McLean, 23; *Garr v. Hill*, 1 Stockt., 210; *Clark v. Depew*, 25 Penn. St. Rep., 509.

quired to answer.¹ And where the illegal trust is established, the devisees or grantees will be decreed to be trustees of the heir at law, or other person legally entitled.²

5. *Purchases from a Trustee with Notice of the Trust: Of Executors, etc.*

Where a person purchases an estate of a trustee, with a knowledge of the trust, though for a valuable consideration, he is bound by the trust to the same extent and in the same manner as the one from whom he purchased.³ And a fine levied by the purchaser with notice will not aid his title or bar the right of the *cestui que trust*.⁴ The principle is this. Where a party acts with a knowledge that his act is in fraud of the rights of another, he shall not be permitted to profit by such fraudulent action; but, to the extent of his acquisition he shall hold for the benefit of the defrauded party. Thus, purchases from executors and administrators of the personal property of their testators, are usually obliga-

¹ *Muckleston v. Brown*, 6 Ves., 52, 67; *Podmore v. Gunning*, 7 Sim., 644; *Edwards v. Pike*, 1 Ed., 267; *Strickland v. Aldridge*, 9 Ves., 516.

² *Cottingham v. Fletcher*, 2 Atk., 155; *Edwards v. Pike*, *ut supra*; *Hill on Trustees*, 164; see *Gage v. Gage*, 9 Foster, 538.

³ *Fisher v. Fields*, 10 Johns. 495; *Murry v. Ballou*, 1 Johns. Ch. Rep., 566; *Shepherd v. McEvers*, 4 John. Ch., 136; *Brown v. Lynch*, 1 Paige, 147; *Lawrence v. Lawrence*, 3 Barb. Ch., 71; *Bradstreet v. Clark*, 12 Wend., 602; *Peebles v. Reading*, 8 Serg. & Raw., 495; *Den v. McKnight*, 6 Halst., 385; see notes to *Le Neve v. Le Neve*, 2 Lead. Cas. in Eq., p. 1, p. 163; *Mead v. Lord Orrery*, 3 Atk., 238; *Earl Brook v. Bulkley*, 2 Ves., 498; *Mansel v. Mansel*, 2 P. Wm., 681; *Pye v. Gorge*, 1 Id., 128; *Taylor v. Stibbents*, 2 Ves. Jr., 437; *Sanders v. Dehew*, 2 Vern., 271; *Adair v. Shaw*, 1 Sch. & Lef., 262; 2 Sugd. V. & P., 269.

⁴ *Kennedy v. Daly*, 1 Sch. & Lef., 379.

tory, for the purchaser cannot be presumed to know whether the sale is necessary or not for the discharge of the testator's debts. But where the purchaser knows the executor is wasting the estate or is converting it into money, the more easily to run away with it, or for any other unlawful purpose, he is chargeable with the fraud, and may be converted into a trustee.¹ On the same principle, debtors colluding with executors or administrators, either to retain or waste the assets, will be held responsible to the creditors of the estate, and the creditors will be permitted to maintain a suit in equity against such debtors.² The general doctrine is, wherever there is a misapplication of the assets, and they can be traced, or their proceeds, into the hands affected with notice of such misapplication, a trust will attach upon the property or proceeds in such hands.²

In cases of the foregoing character the trust attaches upon the principle that the purchaser has been guilty of fraud; that in the purchase of the trust property he has acted in his own wrong, and

¹ Story's Eq., sec. 422; *Worseley v. De Mattos*, 1 Burr., 475; *Ewer v. Corbet*, 2 P. Wm., 148; *Benfield v. Solomons*, 9 Ves., 86, 87; *Hill v. Simpson*, 7 Ves., 152; 1 Mad. Ch. Pr., 228; *Newland on Cont.*, chap. 36, p. 513.

² *Holland v. Prior*, 1 Mylne & Keen, 240; *Newland v. Champion*, 1 Ves., 106; *Doran v. Simpson*, 4 Ves., 651; *Alsager v. Rowley*, 6 Ves., 748; *Beckley v. Dorrington*, West. R., 169; *Burroughs v. Elton*, 11 Ves., 29; Story's Eq., sec. 423, 581, 828; *Field v. Schieffelin*, 1 J. C. R., 155; *Colt v. Lansnier*, 9 Cowen, 320; *Williamson v. Branch Bank*, 7 Alab., 906; *Parker v. Gilliam*, 10 Yerg., 394; *Garnet v. Macon*, 6 Call., 361; *Petrie v. Clark*, 10 S. & R., 388; *Swink's Adm. v. Snodgrass*, 17 Alab. 653; *Graff v. Catleman*, 3 Rand., 204.

his conscience is affected. The principle, therefore, does not apply to purchasers without notice and for a valuable consideration. As to what notice of the trust will charge the purchaser, and when that notice must be given, it must be such notice as will put the purchaser upon his guard, and it must be given in season, to enable the purchaser to protect his rights. Therefore if the purchaser have notice of the trust before paying the purchase money, and he disregard it and pay it he will be charged with the trust; even though the purchase money was secured, and the conveyance actually executed before notice.¹ It has been held that the trust would attach even though the notice was given, after the payment of the purchase money and before the execution of the conveyance; and such is the current of English and American authorities.¹ But it is carrying the doctrine to its utmost limit; and the circumstances should be very peculiar to justify it. Accordingly, it has been held that where the purchase money had actually been paid, even though the conveyance had not been executed at the time of notice, the purchaser would be protected;² and if part of the pur-

¹ *Story v. Lord Windsor*, 2 Atk., 620; *Jones v. Stanley*, 2 Eq. Ca. Abrgt., 685; *Tourville v. Nash*, 3 P. Wm., 307; *More v. Mayhew*, 1 Ch. Ca., 34; *Wigg v. Wigg*, 1 Atk., 384; 2 Sug. V. & P., 274; *Wilcox v. Cal-laway*, 1 Wash. Va., 38; *Snelgrove v. Snelgrove*, 4 Desans., 274; *More v. Clay*, 7 Alab., 742; *Blair v. Owles*, 1 Mumf., 40; *Simmons v. Richardson*, 2 Little, 274; *Williams v. Hollingsworth*, 1 Strob. Eq., 103; *Bush v. Bush*, 3 Strob. Eq., 131; *Alexander v. Pendleton*, 8 Cranch, 462; *Wormley v. Wormley*, 8 Wheat., 421; *Boone v. Childs*, 10 Peters, 177.

² *Youst v. Martin*, 3 S. & R., 430; *Doswell v. Buchanan*, 3 Leigh, 365; *Boggs v. Varner*, 6 W. & S., 469; *Juvenal v. Jackson*, 14 Penn. St. R., 519.

chase money had been paid, the purchaser would be protected, *pro tanto*.¹ The principle to be kept in mind should be the protection of the rights of the innocent party, for, as between the *cestui que trust* and the *innocent purchaser without notice*, the equities are equal.²

Where the purchase has been made by an innocent party for a valuable consideration, he takes the estate discharged of the trust; and can dispose of it even to a party having notice of the trust; and such party will be protected in his purchase, unless he be the original trustee.³ In such case he will be fixed with the trust.⁴

Notice of the existence of the trust must be given to the purchaser himself or to his agent, counsel or attorney.⁵ And the notice must be in the course of the same transaction; or in such close proximity to it, that the purchaser shall be presumed not to have forgotten it.⁶ The general rule is, that the notice must

¹ *Youst v. Martin*, *ut supra*; *Bellas v. McCarty*, 10 Watts, 13; *Juvenal v. Patterson*, 10 Barr., 282; *Flagg v. Mann*, 2 Sumner, 486; *Frost v. Beekman*, 1 J. C. R., 288.

² *Millard's Case*, 2 Freem., 43; *Finch v. Earl of Winchester*, 1 P. Wm., 278; 1 Cruis. Dig., tit. 12, chap. 4, sec. 12; *Hill on Trustees*, 510.

³ *Sweet v. Southcote*, 2 Bro. C. C., 66; *Lowther v. Charleton*, 2 Atk., 242; *Harrison v. Forth*, Prec. Ch., 51; *Bradling v. Ord*, 1 Atk., 571.

⁴ *Armstrong v. Campbell*, 3 Yerger, 201; *Oliver v. Piatt*, 3 How. U. S., 401; *Bovey v. Smith*, 1 Vern., 149; Cruis. Dig., 12, chap. 4, sec. 14; *Church v. Church*, 25 Penn. St. Rep., 278.

⁵ *Brotherton v. Hatt*, 2 Vern., 574; *Newsted v. Searles*, 1 Atk., 265; *Ashley v. Baily*, 2 Ves., 368; 2 Sugd. V. & P., 278; *Hill on Trustees*, 165, 510; *Asler v. Wells*, 4 Wheat., 466; *Blair v. Owles*, 1 Mumf., 40; *Johnson v. Leek*, 19 Wend., 339; *Bracken v. Miller*, 4 W. & S., 108.

⁶ *Warwick v. Warwick*, 3 Atk., 291; *Hine v. Dodd*, 2 Atk., 275; *Worsley v. Earl of Scarborough*, 3 Atk., 392; *Ashley v. Baily*, 2 Ves., 368;

be given by a person interested in the property, and during the treaty of purchase. It is important that a degree of certainty should be required, in order to affect the conscience of the purchaser, with notice of the trust; because, if every vague and idle rumor which the suspicious or evil minded might put in circulation, were to charge the conscience of the purchaser, every man's estate might be slandered. Consequently, vague reports coming from persons who have no interest in the estate or transaction, will not be deemed to be sufficient notice,¹ unless the circumstances are such as would put a prudent man upon his guard.² The principle to be observed is, that the notice must be such as the court, under the circumstances, will deem sufficient to put the purchaser on his guard. And there is no safety in purchasing, where the purchaser has such notice as must raise a doubt in his mind as to the true character of the vendor's title.³

The notice must be in the same transaction according to some authorities.⁴ But if the circumstances

Mountford v. Scott, 3 Mad., 34; *Henry v. Morgan*, 2 Binn., 497; *Hamilton v. Royse*, 2 Sch. & Lef., 327; 2 Sugd. V. and P., 277; *Hargraves v. Rothwell*, 1 Keen, 154; *Perkins v. Bradley*, 1 Hare, 230.

¹ 2 Sugd. V. and P., 276; *Kernes v. Swope*, 2 Watts, 78; *Flagg v. Mann*, 2 Sumn., 491; *Lewis v. Madison*, 1 Mumf., 303; *Meals v. Brandon*, 16 Penn. St. R., 225; *Butler v. Stevens*, 26 Maine, 484; *Boggs v. Varner*, 6 W. & S., 471.

² *Jackson v. Cadwell*, 1 Cowen, 622; *Currens v. Hart*, Hardin, 37; *Curtis v. Mundy*, 3 Metc., 406; *Pearsons v. Daniel*, 2 Dev. & Batt. Eq., 360.

³ See remarks of Sir E. Sugden, in 2 Sug. V. and P., 277, (9 ed.); *Fry v. Porter*, 1 Mod., 300; *Butcher v. Stapely*, 1 Ver., 363.

⁴ *Preston v. Tubbin*, 1 Vern., 286; *Hine v. Dodd*, 2 Atk., 275; *Henry v. Morgan*, 2 Binn., 497; *Ashley v. Bailey*, 2 Ves., 368; *Hill on Trustees*, 510.

are such that the court cannot presume the purchaser to have forgotten it, or rather, if the court must rationally presume the purchaser to have remembered the existence of the trust, it will be sufficient.¹ The purchaser without notice of the trust, can have no higher equity than the *cestui que trust*; consequently the court should make no violent presumptions in favor of the purchaser. It is not always necessary to find that the purchaser had actual notice of the trust, for if the circumstances are such as enable the court to say, not only that he might have acquired notice, but that he ought to have acquired it, and would, had he not been guilty of gross negligence, his conscience will be deemed to be affected.²

Notice of the trust may be actual or constructive. Actual and constructive notice do not differ in their effect upon the conscience of the purchaser or the rights of the parties; they express but different modes of proof of the purchaser's notice. In the one case, the proof is direct and positive; in the other, indirect and inferential. In certain cases, the presumption is so violent that the law will not permit it to be rebutted.³

Whenever the notice is such as to put the purchaser on an enquiry which would lead him to a discovery of the trust, it will be a good constructive

¹ Mountford v. Scott, T. & R., 280; Hargreaves v. Rothwell, 1 Keen., 154; Perkins v. Bradley, 1 Hare, 230.

² Ware v. Lord Egmont, 24 L. J. Ch., 366.

³ Rogers v. Jones, 8 N. H., 264; Farnsworth v. Childs, 4 Mass., 640; Sugd. V. and P., 278; Griffith v. Griffith, 1 Hoff. Ch., 156; Jones v. Smith, 1 Hare, 43 to 55.

notice.¹ For the purchaser must be presumed to have used a reasonable diligence in his enquiry. Thus, where the trustee was not in actual possession of the estate, unless the nature of the estate be such as not to require actual possession, as a reversionary estate, the purchaser would be deemed to have had constructive notice of the trust, for the possession of the estate being in another, and especially in the *cestui que trust*, the purchaser would be bound to enquire into the extent of the interest such possessor might have in such estate.² But this possession of the estate by another, although a notice to the purchaser of all the equities which the one in possession can set up as against the vendor, has been held not to be notice of the title of the lessor where the possession is that of a tenant; and consequently it was held that where the purchaser neglected to enquire into the title of the occupier, he was not to be affected by any other equities than those the occupier may insist on.³

Wherever the trustee attempts to sell a *present* interest in an estate, possession of the estate by him, is deemed essential to the validity of the sale; and it was the opinion of Lord Eldon, that a plea of purchase for a valuable consideration, without no-

¹ Sug. Ven. and P., 290, (9 ed.); *Jackson v. Cadwell*, 1 Cowen, 622; *Flagg v. Mann*, 2 Sumner, 486; *Sigourney v. Munn*, 7 Conn., 324; *Oliver v. Piatt*, 3 How. U. S., 333; *Blaisdell v. Stevens*, 16 Verm., 179; *Kenneday v. Green*, 3 My. & R., 719.

² See *Jackson v. Cadwell*, *ut supra*; *Westervelt v. Haff*, 2 Sandf. Ch., 98; *Barnes v. McCfinton*, 3 Pa. R., 69; *Chesterman v. Gardner*, 5 J. C. R., 29; *Krider v. Lafferty*, 1 Whart., 303; *Flagg v. Mann*, 2 Sumner, 556.

³ *Barnhart v. Greenshields*, 28 Eng. L. and Eq., 77.

tice, would be bad, unless there was an averment therein that the trustee was in possession:¹ otherwise if the interest be reversionary.² The purchaser without notice must have acted in good faith, and with a reasonable degree of prudence; consequently if, suspecting the existence of a trust, he designedly or wilfully omits making enquiries, that he may avoid notice, he will be deemed to have had constructive notice, and will be charged with the trust.³

In the United States, the registration of a deed or mortgage is constructive notice to the world of the rights and equities conveyed thereby.⁴ The rule in England differs from the rule in this country. There, the registration of a deed will not, of itself, fix the purchaser with constructive notice of the trust.⁵ But the policy of this country is to favor the certainty and security arising from the registry of deeds. It is a legal method of giving notice of legal rights and equities arising by deeds, grants, etc., in such a way that all who will exercise due diligence, can be informed of their existence.⁴

The object of the registration of the deed or grant is to give notice to the world of the rights and interests conveyed thereby; consequently, where the

¹ *Walwyn v. Lee*, 9 Ves., 32; see *Daniels v. Davidson*, 17 Ves., 433; *Jones v. Smith*, 1 Hare, 60; *Powell v. Dillon*, 2 Ball. & B., 416; *Jackson v. Rowe*, 4 Russ., 523.

² *Hughes v. Garth*, Ed., 168.

³ *Kennedy v. Green*, 3 M. & K., 699; *Hurn v. Mills*, 13 Ves., 119; *Jones v. Smith*, 1 Hare, 56; *Mertins v. Joliff*, Ambl., 311; *Leiby v. Wolf*, 10 Ohio, 83.

⁴ 4 Kent. Com., 168, and authorities.

⁵ *Hill on Trustees*, 511, and authorities cited.

subsequent purchaser or mortgagee has actual notice of the existence of the unregistered deed or mortgage, he is chargeable with notice, the same as though it were recorded.¹

There is not uniformity in the decisions touching the question of title arising from the prior recording of a subsequent deed. The uncertainty is respecting the character of the notice which will be deemed sufficient to postpone the recorded to the prior unrecorded deed. Where the law requires the purchaser to put his deed or mortgage upon record, in order that others may have notice of his rights, and he neglects to do so, and thereby innocent purchasers are entrapped, equity will protect the innocent and punish the one guilty of such negligence, by postponing his rights to the rights of the innocent purchaser; but where the subsequent purchaser has actual notice of the existence of the unrecorded deed, and seeks to take advantage of the owner's neglect, he is deemed guilty of fraud, and can take nothing thereby.² The proof of notice in such cases must be conclusive, or at least as strong as would be necessary to establish fraud in other cases.² In some

¹ 4 Kent. Com., 170; *Tunstall v. Trappees*, 3 Simons, 286; *Le Neve v. Le Neve*, 3 Atk., 646; 1 Ves., 64; 8 Amb., 436; *Jackson v. Leek*, 19 Wend., 339; *Jackson v. Sharp*, 9 Johns. R., 163; *Farnsworth v. Childs*, 4 Mass., 637; *Correy v. Caxton*, 4 Binney, 140; *McCullough v. Wilson*, 21 Penn. St., 436; *Ohio In. Co. v. Ledyard*, 8 Alab., 866; *Center v. P. & M. Bank*, 22 Alab., 743.

² *Le Neve v. Le Neve*, 3 Atkyns, 646; *Flemming v. Burgin*, 2 Ired. Eq., 584; *Ohio In. Co. v. Ross*, 2 Maryl. Ch. Dec., 35; *Norcross v. Widgery*, 2 Mass., 509; *Bush v. Golden*, 17 Conn., 594; *Frothingham v. Stacker*, 11 Missouri, 77; *Burt v. Cassety*, 12 Alab., 734; *Hopping v. Burnam, Green.*, (Iowa), 39; *Story's Eq.*, sec. 406.

states it has been decided that constructive notice of the existence of the prior deed is not sufficient to charge the subsequent purchaser;¹ in others it is deemed sufficient.² But, as there is no difference between constructive and actual notice, except in the degree of certainty, as to the actuality of the notice to the one to be affected thereby, it will be found that the conflict in these cases is rather apparent than actual. In some states the laws requiring the recording of certain instruments are more imperative than in others; and consequently, the reliance to be placed upon the state of the record is more absolute. In such cases, the purchaser is not bound to look beyond the record for the security of his title, unless he has notice of the title in another. Thus, in Tennessee, it is held that the purchaser does not acquire a perfect title until his deed is recorded;³ under such an imperative necessity to record an instrument, in order to perfect the title of the purchaser, and the title being clear upon the record, actual notice, or that which is equivalent to it in certainty, should be required to charge the

¹ *Norcross v. Widgery*, *ut supra*; *Harris v. Arnold*, 1 R. I., 125; *Bush v. Golden*, 17 Conn., 594; *Spofford v. Weston*, 29 Maine, 140; *Butler v. Stevens*, 26 Maine, 489; *Curtis v. Mundy*, 3 Metcf., 405; *Hennesey v. Andrews*, 6 Cush., 170.

² *Tuttle v. Jackson*, 6 Wend., 213; *Troup v. Hurlbut*, 10 Barb. S. C., 354; *Price v. McDonald*, 1 Mayl. R., 414; *Webster v. Maddox*, 6 Maine, 256; *Colby v. Kenniston*, 4 N. H., 262; *Griswold v. Smith*, 10 Verm., 452; *Bell v. Twilight*, 2 Foster, 500.

³ *Rogers v. Cawood*, 1 Swan., 142; as to principles of constructive notice, see Story's Eq., sec. 399, 400, 400, a, 401, 402, 403, 404, 405, 406, 407, 408 and notes and authorities; also 2 Fonbl. Eq., B. 3, chap. 3, sec. 1, note (b); Sugd. V. and P., chap. 17; Hill on Trustees, 512, notes, and authorities cited.

subsequent purchaser. In all cases of this character, it is the aim of the court to protect the innocent; and whenever it can be certain that one party has sought to take advantage of the other's ignorance or neglect, the court will be very slow to aid such unjust and fraudulent intention. If their equities are in every respect equal, the court will leave them to those advantages and remedies which courts of law will give them.

Lis pendens.—Every person is presumed to be attentive to what is passing in the courts of justice of the state or sovereignty where he resides; consequently a purchase made of property actually in litigation, *pendente lite*, though for a valuable consideration, and without notice in fact, affects the purchaser in the same manner as if he had notice; and he will be bound by the judgment or decree rendered in the suit.¹ This rule is counter to the general principle, that only parties or privies to a judgment or decree are bound by it; but it is founded upon a just public policy, for, if the rule were otherwise, alienations might be made during the continuance of the suit, which would defeat its whole purpose.¹

The filing of a bill and service of a subpoena is a commencement of the *lis pendens*, although the service of a subpoena will not be a sufficient commencement, unless the bill be filed; for, without

¹ Story's Eq., sec. 405, 406; Com. Dig. Ch., 4, c. 3 and 4; 2 Fonbl. Eq., B. 2, chap. 6, sec. 3, note (n); Sorrell v. Carpenter, 2 P. Wm., 482; Worsley v. Earl of Scarborough, 3 Atkyns. 392; Metcalf v. Pulvertoft, 2 V. & Beam, 199; Gaskell v. Durdin, 2 B. & Beatt., 169.

the bill there will be no notice of the matters in controversy or the claims of the complainant.¹

A decree is not, of itself, constructive notice to any except parties and privies to it, and other persons are not presumed to have notice of its contents.² But if one who is not a party to the decree has actual notice of its existence, he will be bound by it:³ the same also as to judgments.⁴ In order to continued notice, there must be a continuance of the *litis contestatio*; that is, something must be done to keep the *lis* in activity, the contest must not be suspended.⁵ A dismissal of the bill is not a discontinuance of the *litis contestatio*, provided an appeal is taken, since it is a question whether the bill was properly dismissed.”⁶

¹ 1 Vern., 318; *Hayden v. Bucklin*, 9 Paige, 512; *Center v. P. & M. Bank*, 22 Alab., 743; *Allen v. Mandaville*, 26 Mississippi, 397; *Hill on Trustees*, 511.

² Story's Eq., sec. 407; 2 Sug. V. & P., 283, (9 ed).

³ 2 Fonbl. Eq., B. 2, chap. 6, sec. 3, note (n); *Harvey v. Montague*, 1 Vern. R., 57; *Davis v. Earl of Strathmore*, 16 Ves., 419; Story's Eq., sec. 407; *Harvey v. Montague*, 1 Vern., 124.

⁴ *Davis v. Earl of Strathmore*, *ut supra*.

⁵ *Kinsman v. Kinsman*, 1 R. & M., 617; *Landon v. Morris*, 5 Sims., 560; *Gibler v. Trimble*, 14 Ohio, 323; *Price v. McDonald*, 1 Maryl'd R., 403.

⁶ *Grove v. Stackpole*, 1 Dow, 31; *Watson v. Wilson*, 2 Dana, 406.

CHAPTER III.

TRUSTS UNDER A POWER.

It sometimes happens that a person having property or money to dispose of, intrusts the disposition thereof to the judgment and discretion of another; and where the intention of the donor or grantor is to trust entirely to such discretion, because of the confidence he has that such person will do better than he, at the time of making the gift or grant, can dictate, such intention confers a mere power; and equity will not interfere with the execution of it.¹ But if there is, connected with such gift or grant, a use clearly indicated, either for the donor, grantor, or for a third party, equity will raise a trust, and use its powers in seeing that it is enforced. The intention of the party making the gift or grant is binding upon the conscience; and where that intention can be clearly ascertained, there is usually little difficulty in carrying it out.²

The distinction between a power and a trust has been clearly defined by the court. A mere power

¹ Story's Eq., sec. 1070; *Wynne v. Hawkins*, 1 Bro. Ch. R., 179; 2 Mad. Ch. Pr., 6; 2 Fonbl. Eq., B. 2, chap. 2, sec. 4, note (x); *Wright v. Atkyns*, 1 Turn. & Russ., 157; *Leggett v. Hunter*, 19 N. Y., 445; *Mason v. Jones*, 3 Edw., 497; *Champlin v. Champlin*, 3 Edw., 571.

² *Withers v. Yeadon*, 1 Rich. Eq., 324; *Bull v. Bull*, 8 Conn., 47; *Errickson v. Willard*, 1 N. H., 217; *Collins v. Carlisle*, 7 B. Monr., 14.

is not imperative, but leaves the action of the party receiving it, to be exercised at discretion. That is the donor or grantor, having full confidence in the judgment, disposition and integrity of the party, empowers him to act according to the dictates of that judgment, and the promptings of his own heart.¹ A trust is imperative; and is made with strict reference to its faithful execution. The trustee is not only empowered, but is required to act in accordance with the will of the one creating the trust.² But cases frequently arise which do not seem to belong entirely to the one or the other of these classes. Lord Eldon,³ remarked that "there is not only a mere trust and a mere power, but there is also known to the court, a power with which the party to whom it is given is intrusted; and is required to execute."³ Such cases arise where the donor has entrusted the party with money or property to be used according to his judgment or discretion, for the use of certain persons, or class of persons; but nevertheless to be used for others than himself. The discretion to be exercised on the part of the trustee, is not absolute, but confined to the *time*, the *manner*, or the *particular individuals* of a class.⁴

Where, from the language of the instrument con-

¹ Story's Eq., sec. 1061, 1070; Hill on Trustees, 67.

² Knight v. Knight, 3 Beav. R., 148, 172, 175; Story's Eq., sec. 1070, and note.

³ Brown v. Higgs, 8 Ves., 570; Story's Eq., sec. 1061, (*a*), 7th ed., and numerous authorities cited in note.

⁴ Brest v. Offley, 1 Ch. R., 246; Hoey v. Kenney, 25 Barb., 396.

ferring the power, or creating the trust, it can be clearly ascertained to have been the intention of the donor, testator, &c. that others than the person intrusted should be entitled to the use of the whole, or a part of the property, although a discretion as to the *time when*, the *mode in which*, or the *individuals to whom*, that use was to accrue is vested in the one intrusted, courts will endeavor, if possible to raise a trust, and enforce the execution of it.¹ By the term, if possible, is meant, if the subjects and objects of the trust be sufficiently certain to enable the court to execute it according to the intention of the party creating it, they will decree it to be a trust, notwithstanding the discretion reposed in the trustee.¹

More recently courts are disposed, if possible, to construe all gifts and bequests of this character, as gifts by implication to the objects named or recommended in the instrument conferring the power, so that the tendency is to favor the raising of trusts under a power.²

In the examination of cases partaking in part of the nature of a power, and in part of the nature of a trust, it is important to keep in mind the principle, that the intention of the party creating the trust or conferring the power is to govern, and that circumstances which tend to prove that intention

¹ Story's Eq., sec. 1068; *Brest v. Offley*, 1 Ch. Rep., 246; *Harding v. Glyn*, 1 Atk., 469; *Tibbits v. Tibbits*, Jac. Rep., 317; *Massey v. Sherman*, Ambl. R., 520; *Lewin on Trusts*, chap. 5, sec. 2, p. 77, etc.; *Parsons v. Baker*, 18 Ves., 476; *Dominick v. Sayer*, 3 Sandf., 555.

² *Brown v. Higgs*, 8 Ves., 576; 2 Sugd. Pow., 179; *Hill on Trustees*, p. 69.

are only valuable for such purpose. An examination of the diverse decisions in these, as in other cases, will show that the courts have often attached too much importance to a certain class of facts, independent of that which those facts tended to establish.

It is said that "there appears to be a material distinction between those cases where the *absolute interest* is given to the donee of the power, and where the person by whom the power is to be exercised takes only a *previous estate for life*, to which the power is only collateral."¹ But the distinction goes no further than the evidence thereby furnished of the intention of the donor. The nature and quality of the estate becomes a fact to be considered in connection with all other circumstances, and is liable to overrule or be overruled accordingly. The fact that the personal interest of the donee of the power might be against his making any appointment, may be supposed to have been within the knowledge of the donor, and had he intended to have guarded against such personal interest he would have made the appointment imperative. But such fact being within the knowledge of the donor, and yet failing to make the appointment imperative upon the donee, it might very properly be inferred that he intended to make the discretion of the donee absolute.²

The instrument conferring the power may also

¹ Hill on Trustees, p. 68; *Crossling v. Crossling*, 2 Cox, 336.

² See Hill on Trustees, p. 68, and authorities.

create a trust, and the trust so created may be made subject to the power thus conferred; and if the power be exercised, the trust may be modified or defeated thereby, but if not, it may stand.¹ It is not meant that when a gift is clearly impressed with the character of a trust, that a discretionary power subsequently given, can control its application; but a gift may be impressed with such a character, conditioned upon the exercise of a power conferred at the same time.¹

There are cases where the gift is absolute upon its face, and, although words of recommendation and desire in respect to its use are expressed, they are not imperative, and consequently do not bind the donee.² But there are cases likewise where the desire, although not expressed imperatively, clearly indicates the intention of the donor or testator to be, that the donee shall not take absolutely, but that a trust shall be created in favor of certain objects. Thus, "where a tenant for life is desired, at his death, to give it amongst his children as he may think fit; such desire is deemed a sufficient expression of the will and intent of the donor; and, although the tenant fail to designate the particular individuals to whom it shall go, the court will carry out that intent as near as possible, by dividing it among them all equally."³

¹ *Brown v. Pocock*, 6 Sim., 257; *Bull v. Vardy*, 1 Ves. Jr., 271; 2 Sugd. Pow., 177; *Withers v. Yeadon*, 1 Rich. Eq., 324.

² *Bull v. Vardy*, 1 Ves. Jr., 270; *Crossling v. Crossling*, 2 Cox, 396; *Duke of Marlborough v. Godolphin*, 2 Ves., 61; 5 Ves. Jr., 506.

³ *Mason v. Limbury*, 2 Sugd. Pow., 181; *Hoey v. Kenny*, 25 Barb., 396.

In determining whether a trust is created under a power of appointment, reference must be had to the principles essential to the creation of an express trust, which are, 1. The words creating the trust must be imperative, as distinguished from optional or discretionary. 2. The subject of the trust must be certain that the court may know to what it attaches. 3. The objects of the trust must be certain, that the court may know for whose benefit it is intended.¹

An application of these principles to cases decided, will illustrate them. A testator devised his real estate and negroes to his son, G. W., *in trust*, 1, to apply the rents, issues and profits, to the use of himself and family, and the education of his children: 2, and to give or devise by deed or will, the said property, and the rents, issues and profits thereof, over and above what he should apply to the uses aforesaid, unto all or any child or children by him, begotten or to be begotten, in such a way and manner, and in such proportions, and for such uses, estates and interests, as he shall see fit and proper. G. W. died, leaving a will, by which he devised the whole of his estate to his wife, with directions that his executors, (his wife and sons) should act under his father's will in trust and in every respect and manner intended by their grandfather.

¹ See what is sufficiently imperative, see note to *Lawless v. Shaw*, Lloyd & Gould, 154; *Wright v. Atkins*, 1 Turn. & Russ., 143; *Briggs v. Penny*, 8 Eng. L. and Eq., 231; see *Story's Eq.*, sec. 1070, and authorities; *Robinson v. Allen*, 11 Gratt., 785; *Gilbert v. Chapin*, 19 Conn., 351; *Harper v. Phelps*, 21 Conn., 257.

First it is to be noticed, that the estate was given to G. W., in trust. 2. That G. W. was invested with discretionary powers as to whom, of a certain class, were to be the particular objects of such trust; when, how, in what proportions, and with what estates they were to be invested. But observe, the discretion of G. W. did not extend to the trust itself. Although he had a discretion as to the particular persons, as to the time when, as to mode by which, and as to the quantity of the estate to each, nevertheless the estate was to be used for the benefit of others than himself, making the trust imperative. Upon this state of facts, the court held, 1. That the legal estate was in G. W., coupled with a power in trust to appoint, at his discretion, among his children. 2. That this power could not be delegated,¹ and, 3, as G. W. had neglected to exercise the power, his children were entitled to divide the property equally.²

It is to be observed that the discretion or power of appointment can not be delegated to another; neither will the court exercise it, on the failure of the one to whom it is given to do so; and in all such cases, the whole of the objects who were within the power, will in general take equally.³ The reason

¹ *Alexander v. Alexander*, 2 Ves., 640; *Kemp v. Kemp*, 5 Ves., 849; *Penny v. Turner*, 2 Phillips, 493; *McNeillidge v. Galbraith*, 8 S. & R., 43; *Withers v. Yeadon*, 1 Rich. Eq., 324.

² *Withers v. Yeadon*, 1 Rich. Eq., 324; see *Collins v. Carlisle's heirs*, 7 B. Monr., 14; *Bull v. Bull*, 8 Conn., 47; *Gilbert v. Chapin*, 19 Conn., 351; *Harper v. Phelps*, 21 Conn., 257.

³ *Davy v. Hooper*, 2 Vern., 665; *Mason v. Limbury*, 2 Sugd. Pow., 181; *Kemp v. Kemp*, 5 Ves., 849; *Madison v. Andrews*, 1 Ves., 57; *Kennedy v. Kingdon*, 2 J. & W., 431; *McNeillidge v. Galbraith*, 8 S. & R., 43.

for this is, that the class of objects, having been designated as objects of the trust, subject to such discretion in selecting or making appointments as the donee in trust was empowered to exercise, and, having failed to exercise such power, it is the will of the donor or testator, that each individual of the class should take equally. In such cases, courts treat the bequest as a direct gift to the objects specified, in default of the exercise of the power.¹

In another case,² a widow upon her second marriage, settled a fund, in trust, for her own separate use *for life*, and declared that subject thereto, the fund should, “*as and when she should think fit or be advised, be settled in trust for the benefit of A., her daughter by her first marriage, and her daughter’s intended husband and her children, in such manner and for such rights and interests as should be agreed upon, either previous to or after the marriage of A., with her consent; and she—the widow—should be at free liberty, and have full power and authority to settle the fund or any part of it in trust for the immediate benefit of her daughter and children; but if her daughter should not be married in her mother’s lifetime, then the fund should be in trust for the daughter’s benefit, and a vested interest in her at twenty-one, with a trust over on the death of the daughter without marrying in the lifetime of the mother.*” In this case the trust was declared, subject to the use of the mother for life, and subject

¹ 2 Sugd. Pow., 177; Bull v. Vardy, 1 Ves. Jr., 271.

² Croft v. Adam, 12 Sim., 639; see Brown v. Pocock, 6 Sim., 257.

to certain discretionary powers of the settler, extending to the *time, manner*, etc., of its enjoyment; but not extending to the trust itself; therefore, it was properly held by the V. C. of England, that this was a *trust* for the daughter, her husband and children, subject to certain modifications of their interest by the mother, had she seen fit to have exercised her power.¹

From the foregoing it becomes evident that a trust will be raised under a power where the discretion does not extend to the trust itself, and where the subject and object of the trust are sufficiently certain to enable the court to execute it according to the manifest will of the testator, etc.²

Where an absolute gift is made to a person, accompanied by expressions indicating a wish on the part of the testator that certain others shall participate in its beneficial enjoyment, courts are strongly inclined to give such an effect to the will as to raise a trust in favor of such beneficial objects. This bias of the court is allowed, that they may give effect to the supposed intentions of the testator. But care should be had lest the intentions of the testator to invest the donee with a sound discretion in the premises be defeated.³ In determining cases of this character, the first question to be settled is: Did the testator intend to make the trust impera-

¹ See preceding note.

² Withers v. Yeadon, 1 Rich. Eq., 324; Collins v. Carlisle, 7 B. Monr., 14; McNeilledge v. Galbraith, 8 Ser. & Raw., 43.

³ Story's Eq., sec. 1069; see Lucas v. Lockhart, 10 Sm. & M., 466; Hunter v. Stembredge, 12 Geo., 192; Steele v. Levisay, 11 Gratt., 454.

tive, or did he intend to invest the donee with a discretion to apply or not to apply the gift as indicated by him?¹ The second question is: Are the subjects and objects of the trust sufficiently certain to enable the court to execute it? or in the language of Judge Story,² wherever, therefore, the objects of the supposed recommendatory trusts are not certain or definite; wherever the property to which it is to attach is not certain or definite; wherever a clear discretion and choice to act or not to act is given; wherever the prior dispositions of the property import absolute and uncontrollable ownership; in all such cases courts of equity will not create a trust from words of this character.³ So likewise uncontrollable power of disposition amounts to an ownership, and does not raise a trust.³

In New York and some other States,⁴ powers in trust have been very much enlarged and modified by statute. It is provided⁵ that when an express trust shall be created for any purposes other than those specified by the statute authorizing the creation of express trusts, no estate shall vest in the

¹ See preceding note.

² Equity, sec. 1070; See *Wynne v. Hawkins*, 1 Bro. Ch. R., 179; *Harland v. Trigg*, 1 Bro. Ch. R., 143; *Meredith v. Heneage*, 1 Sim. R., 542; *Moggridge v. Thackwell*, 7 Ves., 82; *Eade v. Eade*, 5 Madd. R., 118; *Curtis v. Rippon*, 5 Madd. R., 434.

³ *Morice v. Bishop of Durham*, Turn. & Russ., 405; *Tallmage v. Sill*, 21 Barb., 34; *Gilbert v. Chapin*, 19 Conn., 351; *Harper v. Phelps*, 21 Conn., 257; *Williams v. Williams*, 1 Sim. N. S., 358; *Webb v. Woolls*, 2 Sim. N. S., 267; *Thompson v. McKisick*, 3 Humph., 631; *Ellis v. Ellis*, 15 Alab., 296; *Hoey v. Kenny*, 25 Barb., 396; see *French v. Hatch*, 8 Foster, 331; *Hart v. White*, 26 Vt., 260.

⁴ Michigan and Wisconsin.

⁵ N. Y. Rev. St., tit. 2, art. 2, sec. 58 and 59.

trustee. But the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, shall be valid as a *power in trust*, subject to the provisions relating to such powers contained in the article on that subject. But in all cases where the trust shall be valid as a power, the lands to which the trust relates shall remain in, or descend to the persons otherwise entitled, subject to the execution of the trust as a power. The statute abolishes all powers as they exist by law, and declares that their creation, construction and execution shall be governed by the provisions of said article.¹ It defines a power to be, "An authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving the power might himself lawfully perform."² It defines that to be a *general power*, which authorizes the alienation *in fee* by conveyance, will or charge of the land embraced in the power, *to any alienee whatever*. But that which designates the *particular persons* or *class of persons* to whom the disposition of the lands under the power is to be made; or where the particular estate or interest to be aliened by conveyance, will or charge, *is less than a fee*, the power is denominated *special*.³ These powers are *beneficial* when no other person than the grantee has, by the terms of its creation, any interest in its execution; and *general powers* are in

¹ Art. 3, R. S., 1846, entitled "Of Powers."

² Sec. 74 of chap. 1, tit. 2.

³ Sec's 77 and 78.

trust when others than the grantee of such power are designated as entitled to the proceeds, or any portion of the proceeds or other benefits resulting from the alienation of the lands according to the power:¹ and a *special power* is in *trust* when the disposition which it authorizes is limited to be made to any persons or class of persons other than the grantee of such power; or where any person or class of persons other than the grantee are designated as entitled to any benefit from the disposition or charge authorized by the power.²

The statute further provides³ that every *trust power* shall be *imperative*, except where its execution, or non-execution, is made *expressly* to depend on the will of the grantee of the power; and that equity shall compel its performance. So, also, shall it be *imperative* when the grantee has the right to select any, and exclude others of the persons designated as the objects of the trust. And, where the disposition is to be made to, among or between several persons, without specifying *the share* to each, they shall *share equally*; But where the terms of the power import a discretion to the grantee or trustee of the power, as to the shares of each, he can allot the whole to any one to the exclusion of the rest. And if he die without making any allotment, equity will apportion it equally among the designated objects. It also provides that where a power in trust is created by will and the testator omits to desig-

¹ Sec. 94, Art. 3, R. S., entitled "Of Powers."

² Sec. 95, *ib.*

³ Sec. 96, *ib.*

nate by whom the power is to be exercised, its execution shall devolve upon a court of chancery.

The above are the leading provisions to which *express trusts*, not authorized by statute, and yet directing the performance of that which may lawfully be performed, are subject. Being, by operation of the statute, transmuted to *powers in trust*, they are to be construed and executed according to the foregoing provisions. They become imperative where they are not made expressly to depend upon the discretion of the trustee, and equity will compel their execution. But in these cases, the legal estate does not pass to the trustee ; but remains in, and descends to the person or persons otherwise entitled, subject to the execution of the trust as a power.¹ It is held by the court² that a *power in trust* is a mere authority to limit a use, and the legal estate remains undisturbed.

It is provided, however,³ where an absolute power of disposition, unaccompanied by any trust, shall be given to the *owner of a particular estate, for life or for years, such estate shall be changed into a fee*, absolute in respect to creditors and purchasers; but subject to any future estates limited thereon, in case the power should not be executed, or the lands be sold for the satisfaction of debts.³ So likewise where the like power of disposition is given to a person to whom no particular estate is limited, he takes a fee

¹ Sec. 58 and 59, *ib.*

² *Farmers' Loan and Trust Co. v. Carroll*, 5 Barb., 613.

³ Sec. 81, *ib.*; see *Tallmadge v. Sill*, 21 Barb., 34; *Hoey v. Kenny*, 25 Barb., 396.



absolute in respect to creditors and purchasers, but subject to any future estates that may be limited thereon;¹ and where no remainder is limited thereon, the grantee takes an absolute fee.² It is the same, also, where a general beneficial power to devise the inheritance, is given to a tenant for life or years; and every power of disposition is to be deemed absolute, by means of which the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit.³

¹ Talmadge v. Sill, *ut supra* ; Hoey v. Kenny, *ut supra*.

² Sec. 83, *ib*.

³ Secs. 84, 85, *ib*.

CHAPTER IV.

TRUSTS RAISED BY PRECATORY WORDS,
WORDS OF RECOMMENDATION, ETC.

It has already been observed that where the subject matter of a trust is definite and certain, where the objects of the trust are clearly pointed out, and where the will of the testator is imperatively expressed in reference thereto, that a trust is thereby created.¹ So, also, where the testator has clearly created a trust, but has left the *time, manner*, and the *particular objects* thereof to be determined upon at the discretion of the trustee, courts will declare and enforce the trust, even though the trustee should neglect or refuse to exercise such discretionary power.² But courts go still further, and create implied or constructive trusts from mere words of recommendation, and precatory words of the testator. Trusts created in this way, usually leave it to the free will or discretion of the trustee to determine *how, when*, and in *what manner*, the trust shall be executed or paid. This class of trusts are very

¹ See trusts under a power; *Malim v. Keighley*, 2 Ves. Jr., 305; *Knight v. Knight*, 3 Beav., 148; *Tibbitts v. Tibbitts*, 19 Ves., 664; *Wilson v. Major*, 11 Ves., 205; *Harrison v. Harrison*, 2 Gratt., 1; *Erickson v. Willard*, 1 N. H., 217; *Collins v. Carlisle*, 7 B. Monr., 14.

² *Knight v. Boughton*, 11 Cl. & Fin., 513; *Paul v. Compton*, 8 Ves., 380; *Harrison v. Harrison*, 2 Gratt., 1; *Reeves v. Baker*, 18 Beav., 372; *Lucas v. Lockhart*, 10 Sm. & M., 466.

nearly allied to those which are raised under a power. The principles by which the trust is determined are the same in both cases. In all cases of this character, although an almost unlimited discretion is given to the party becoming trustee, yet if it clearly appear from the language of the testator, and from all the circumstances, that it was his will that such property or any portion of it should be held for the benefit of others specified, a resulting trust will arise for their benefit. Thus, any words by which such a will is expressed not subject to the absolute discretion of the donee, will be deemed sufficient, if the subject and object be sufficiently certain. The words "I desire"—"I will and desire"—"I recommend"—"I hope and trust"—"Trusting and wholly confiding"—"not doubting"—"in the fullest confidence," etc.,—will often be deemed sufficiently imperative to raise the trust.¹ Courts, however, have carried this doctrine to very great lengths, and recently are not disposed to extend it. This construing a mere wish or desire into a peremptory command, more frequently defeats the intention of the testator, than carries it out. It

¹ See *Brest v. Offly*, 1 Ch. Rep., 246; *Harding v. Glynn*, 1 Atk., 469; *Mogridge v. Thackwell*, 7 Ves., 36; *Cruwys v. Colman*, 9 Ves., 319; *Malvin v. Keighley*, 2 Ves. Jr., 333; *Knight v. Knight*, 3 Beav. R., 148; *Brown v. Higgs*, 8 Ves., 570; *Parsons v. Barker*, 18 Ves., 476; *Tibbits v. Tibbits*, 19 Ves., 655; *Jac. Rep.*, 317; *Massey v. Sherman*, Ambl. R., 520; *Vernon v. Vernon*, Ambl. R., 4; *Edes v. England*, 2 Vern., 466; *Nowlan v. Nelligan*, 1 Bro. C. C., 489; *Harland v. Trigg*, 1 Bro. C. C., 144; *Pier-son v. Garnet*, 2 Bro. C. C., 38; *Birch v. Wade*, 3 V. & B., 198; *Wright v. Atkins*, 1 V. & B., 313; *Lewin on Trusts*, chap. 5, sec. 2, p. 77, etc., where authorities are collected; *Steele v. Levisay*, 1 Gratt., 454; *Harrison v. Harrison*, 2 Gratt., 1.

should be presumed that the testator knew the difference between a desire and a command, and used the language with reference thereto. It has been well said, that "the first case that construed words of recommendation into a command made a will for the testator, etc."¹ If the expressions used, when taken in connection with all the circumstances, only confer a *power* upon the donee, and leave him to do or not to do, to apply or not to apply the gift, according to the expressed wish of the testator, no trust will be created. Any means or evidence by which it becomes clear that the words of "desire" or "recommendation" were not intended to be obligatory upon the donee, will defeat the trust.²

In truth, the effect which expressions of this character are to have in creating a trust, must be determined by the intention of the donor, as gleaned not only from the words themselves, but also from the context and circumstances of the case. Should he declare that his words of recommendation were not to be considered as an injunction, &c.,³ or that the donee, in reference to the objects of his desire and recommendation, was to remain *free and unfet-*

¹ *Sale v. Moore*, 1 Sim. R., 534; see *Story's Eq.*, sec. 1069, and notes and authorities; also *Hill on Trustees*, p. 72, and authorities; *Williams v. Williams*, 1 Sim. N. S., 358; *Webb v. Woolls*, 2 Sim. N. S., 267; *Pope v. Pope*, 10 Sim. R., 1.

² *Bull v. Vardy*, 1 Ves. Jr., 270; *Young v. Martin*, 2 Young & Coll. Ch., 582, 590; *Brunson v. Hunter's Adm.*, 2 Hill's Ch., 490; *Knott v. Cottee*, 2 Phill., 192; *Thompson v. McKissick*, 3 Humph., 631; *Ellis v. Ellis*, 15 Alab., 296; *Skrine v. Walker*, 3 Rich. Eq., 262; *Pinnock's Estate*, 20 Penn. St., 268; 1 Am. Law Reg., 342; *Gilbert v. Chapin*, 19 Conn., 351; *Harper v. Phelps*, 21 Conn., 257.

³ *Young v. Martin*, 2 Y. & Coll. Ch., 582.

tered,¹ or that the property was to be at his *sole and entire disposal*, and the like,² no trust would be inferred however strong might be the language of recommendation or desire merely.

It sometimes happens that language accompanying gifts and bequests, clearly indicates that a trust was intended; but owing to the indefinite manner of setting forth the subject of the trust, it cannot take effect; and so the donee holds, discharged of the trust.³ Thus, where a testator bequeathed to his wife all the residue of his personal estate, not doubting but that she will dispose of what shall be left at her death to our two grandchildren. Here the desire that the two grandchildren shall receive what remained unexpended at the death of the wife, was sufficiently certain; but it was equally certain that she was entrusted with the absolute disposal of the property during her lifetime, and, consequently, had the power of determining what that residue, if anything, should be. This right on the part of the wife, is inconsistent with the character of trustee, and therefore no trust could be raised. Hence, the court held that the uncertainty of the subject was such that the recommendatory trust was defeated.⁴ It is laid down as a principle,

¹ Meredith v. Heneage, 1 Sim., 542, etc; Knight v. Knight, 3 Beavan, 174.

² Hoy v. Master, 6 Sim., 568.

³ Flint v. Hughes, 6 Beavan, 342; Knight v. Knight, 3 Beavan, 173-9; Jackson v. Robinson, 15 Johns., 171; 16 Johns., 586; Jackson v. Bull, 10 John., 19; Ide v. Ide, 5 Mass., 500; Smith v. Bell, Mart. & Yerg., 302.

⁴ Wynne v. Hawkins, 1 Bro. Ch. R., 179; see Pushman v. Filliter, 3 Ves., 7; Eade v. Eade, 5 Madd. R., 118; Sale v. Moor, 1 Sim. R., 534; Podmore v. Gunning, 7 Sim. R., 614; Wood v. Cox, 1 Keen R., 317.

that where the first taker is empowered to withdraw from the object of the wish, any part of the subject; or, is left at liberty to apply it to his own use, that such liberty will render the subject so uncertain as to defeat the trust.¹ The reason for this principle is, the first taker could not be at liberty to appropriate the property, or any part of it, in such a way as to defeat the recommendation or wish of the testator, unless he was invested absolutely with the beneficial interest therein. Therefore when the language is such, that such a right is found to be in the donee, it must necessarily be fatal to the existence of a trust.

There should be a distinction made between certain classes of cases which are usually considered as failing to raise a trust, owing to the uncertainty of the subject thereof. In the case of *Bland v. Bland*,² above cited, where the testatrix gave all her real and personal estate to her son Sir John Bland, his heirs, executors, administrators and assigns, charged with the payment of debts and legacies; and then

¹ Hill on Trustees, p. 74; Story's Eq., sec. 1070, and note (7 edit.); *Knight v. Knight*, 3 Beav., 174, and authorities; *Bland v. Bland*, 2 Cox, 349; *Wilson v. Major*, 11 Ves., 205; *Bull v. Kingston*, 1 Mer., 314; *Lechmere v. Lavies*, 2 M. & K., 197; *Curtis v. Rippon*, 5 Madd., 434; *Harwood v. West*, 1 Sim. & Stu., 387.

² 2 Cox, 349; see the opinion of Judge Lowrie, in the case of Pinnoek's Estate, 20 Penn. St. R., 268. He declared, as the result of his investigations and reflections, that the words in a will expressive of desire, recommendation, and confidence, were words of common parlance, and not technical; and that they were not, *prima facie*, sufficient to convert a devise or bequest into a trust. That they were only declaratory of a trust when it appeared from other parts of the will that the testator did not intend to commit the ultimate disposal of the property to the devisee or legatee, as his kindness, justice or discretion might dictate.

added, "it is my earnest request to my son, Sir J. Bland, that, on failure of issue of his body, he will, sometime in his lifetime, settle the said premises, or so much thereof as he shall stand seised of at the time of his death, so, and in such manner as, that, on failure of issue of his body, the same may come to my daughter, and the heirs of her body."¹ The Chancellor decided that no trust was created in favor of the daughter, &c., owing to the uncertainty of the subject. Had there been no other principle involved than the uncertainty of the subject, that could have been rendered certain at the time of the decease of Sir John; and the trust created might have been enforced. But the principle involved in the case, which might have been more decisive of the question, upon more rational grounds was this. By the terms of the will, Sir John was invested with a discretion inconsistent with the character of a trustee in the premises. The language of the will implied that Sir John B., had the absolute title in himself, with the consequent right of disposing of such parts thereof as he might see fit. Hence, although it was true that the subject of the recommendatory trust was uncertain, it was nevertheless true, that the right of Sir John to dispose of the subject thereof absolutely, rendered the subject of the trust uncertain. The same principle is applicable in the case of *Wynne v. Hawkins*, where the testator, by his language, "that he desired she

¹ See preceding note.

² 1 Bro. C. C., 179.

should give what should be left at the time of her death" to his children or grandchildren, implied that the absolute right of disposal was in her for her own use and benefit; consequently the property could not be the subject of a trust for "his children or grand children." So also, where the request is, "that if she die single, she will leave what she has, amongst her brothers and sisters, or their children;"¹ implying her right to dispose of what portion of the property for her own benefit, she might find necessary or think proper; which right is absolutely inconsistent with the existence of a trust. An examination of the cases decided upon the ground that the subject of the trust was insufficiently defined, or too uncertain to enable the court to decree its execution, will show that in many cases the uncertainty arises from the right in the donee to dispose of the property for his own use and benefit, which right in the donee is fatal to the existence of a trust.²

But these recommendatory trusts often fail of

¹ *Lechmere v. Levie*, 2 M. & K., 197; see *Cowman v. Harrison*, 17 Jur., 313; *Johnston v. Rowlands*, 2 De G. & Sm., 356; *Webb v. Woolls*, 2 Sim. N. S., 267; *Reese v. Baker*, 18 Beav., 372.

² *Pennock's Estate*, 20 Penn. St., 268. In *Pennock's Estate* the testator, after providing for the payment of the debts, said, "I will and bequeath unto my dear wife A., the use, benefits and profits of all my real estate, during her natural life, and also all my personal estate of every description, including ground rents, bank stock, bonds, notes, book debts, goods and chattels, absolutely, having full confidence that she will leave the surplus to be divided, at her decease, justly among my children." Held that the absolute ownership of the personal property was given to the widow. See *Hoy v. Master*, 6 Sim., 568; *Pope v. Pope*, 10 Sim., 1; *Curtis v. Rippon*, 5 Mad., 434; *Tallmadge v. Sill*, 21 Barb. 34; *Hoey v. Kenny*, 25 Barb., 396.

taking effect, because the *objects* of the trust are so indefinitely expressed or defined that the court cannot ascertain with certainty the intention of the testator. The reason for this uncertainty in setting forth the objects of the testator's benevolence is probably owing to the uncertainty existing in the testator's mind at the time of making his bequests. Having confidence in the understanding, judgment, fidelity and good purposes of the donee, the testator commits his property and wishes into his hands to be used as his judgment, under all circumstances, may dictate. In all such cases the court does well to leave it where the testator places it, in the hands of the donee. But if the language of the testator is sufficiently explicit to enable the court to see his wishes carried into effect, they will not permit the donee to defraud the objects of the testator's solicitude by appropriating the means to his own private or personal use. As it is, courts are strongly inclined to see that the particular wishes of the testator, in respect to these objects of recommendation, are carried into effect. And, although it is a principle in the creation of trusts that the object of the trust must be certain and definite to enable the court to see it executed, courts will go a great way to aid the trust, by endeavoring to ascertain the objects. Referring to such objects as a class, where the particular persons of the class can be determined, will be deemed sufficient.¹ Thus, where

¹ *Mason v. Limbury*, cited *Ambl.*, 4; *Massey v. Shearman*, *Ambl.*, 520; *Malim v. Knightley*, 2 *Ves. Jr.*, 333; *Pierson v. Garnet*, 2 *Bro. C. C.*, 38, 226; *Parsons v. Baker*, 18 *Ves.*, 476; *Stanger v. Nelson*, 20 *Jurist*, 27; 2 *Sugd. Pow.*, 181.

certain portions of an estate are to be equally divided between his brother's and sister's children,¹ or where there is a gift to the wife for the support of herself and family,² the objects of the trust were deemed sufficiently certain. The principle would seem to be, that where the reference to the class is such that the individuals composing the class can be individually determined and separated from all others, the designation is sufficient. Thus the term "family," "families,"³ "all the testator's cousins,"⁴ "relations,"⁵ "descendants," &c., have been held to be a sufficient designation of the objects of such trusts.

The same principles are applicable to classes as objects under recommendatory trusts as are to objects under powers. Where a gift is in trust for such individuals of a certain class, as the donee, in his discretion, shall appoint; and the donee fails to appoint, all the individuals of the class take equally. So under a recommendatory trust; if it be for such of a class as the donee shall appoint, and he fails to appoint, each of the class takes equally.⁶

¹ Barnes v. Patch, 8 Ves., 604.

² Wood v. Wood, 1 M. & Cr., 408; Gregory v. Smith, 9 Hare, 708.

³ Barnes v. Patch, *ut supra*; Wood v. Wood, *ut supra*.

⁴ Stanger v. Nelson, 20 Jurist, 27.

⁵ Pierson v. Garnet, 2 Bro. C. C., 38; Harding v. Glynne, 1 Atk., 469; Birch v. Wade, 3 V. & B., 198.

⁶ Birch v. Wade, 3 V. & B., 198; Brown v. Higgs, 4 Ves., 708; Cruwys v. Colman, 9 Ves., 319; Longmore v. Broom, 7 Ves., 124.

TRUSTS FOR CHARITABLE PURPOSES.

The term Charity, as used in an equitable sense, does not import simply relief to the poor and needy ; but rather a gift to a general public use, including the rich as well as the poor.¹ There has been much discussion among the profession whether these trusts for charitable purposes have their origin in the statute 43 Elizabeth, or whether they were of that class of which Chancery, under the common law, had jurisdiction previous to that statute. This question is learnedly discussed by Judge Story in his Equity Jurisprudence,² and he concludes: "Upon the whole, it seems now to be the better opinion that the jurisdiction of the Court of Chancery over charities, where no trust is interposed, or where there is no person *in esse* capable of taking, or where the charity is of an indefinite nature, is to be referred to the general jurisdiction of the Court of Chancery, anterior to the statute of Elizabeth." He says "this opinion is supported by the preponderating weight of authorities speaking to the point, particularly those of recent date," as well, also, as the language of the statute itself.³

The statute 43 Elizabeth is introduced by reciting

¹ Jones v. Williams, Ambler, 652; Morice v. Bishop of Durham, 9 Ves., 405; Franklin v. Armfield, 2 Sneed., 305.

² Sec. 1136 to 1162; see Incorporated Society v. Richards, 1 Con. and Law, R., 58, S. C. P.; 1 Daury & War., 258.

³ Story's Eq., sec. 1162; see judgment of Justice Baldwin in the Circuit Court of Penn., April Term, 1833, in case of will of Sarah Zane; Vidal, &c., v. Girard's Executors, 2 Howard's S. C. R., 127; 1 Cooper's Public Records, 355, Calendar of Proceedings in Chancery.

that lands, goods, money, etc., had been given, etc., heretofore to certain purposes—enumerating them—which lands, etc., had not been employed according to the charitable intent of the givers and founders, by reason of frauds, breaches of trusts, and negligence of those that should pay, deliver and employ the same. The statute then provides that it shall be lawful for the Lord Chancellor to award commissions under the great seal, to proper persons, to enquire by juries of all such gifts, etc., and of breaches of trusts, etc., in respect to the same, which have been heretofore or which may hereafter be given to, or for any such charitable or goodly uses before rehearsed, etc., and upon such hearing they were to set down such orders, judgments and decrees, as the lands, goods, moneys, etc., may be faithfully employed to and for such charitable uses, etc., for which they were given; which orders, etc., not being contrary to the orders, statutes and decrees of the donors and founders, shall stand firm and good, according to the tenor and purpose thereof, and shall be executed accordingly, until the same shall be undone and altered by the Lord Chancellor, etc., upon complaint by any party grieved, to be made to them, etc. The uses described as good and charitable by that statute are as follows: “For relief of aged and impotent, or poor people; for maintenance of sick and maimed soldiers, schools of learning, free schools, scholars in universities, houses of correction; for repairs of bridges, of ports and havens, of causeways, of churches, of sea banks, of highways; for education and preferment of orphans, for marriage

of poor maids, for support and help of young tradesmen, of handicraftsmen, of persons decayed; for redemption or relief of prisoners or captives, for care and aid of poor inhabitants, concerning payment of fifteenths, setting out of soldiers and other taxes.”¹

Although the court of chancery exercised jurisdiction over charities anterior to the statute of 43 Elizabeth, and although it is now held, both in England and the United States, that chancery has original jurisdiction in such cases.² yet, since that statute, no bequests are deemed within the authority of chancery, capable of being established and regulated thereby, except bequests for those purposes which that statute enumerates as charitable, or which, by analogy, are deemed to be within its spirit and intendment.³ It is not necessary however that the gift, etc., shall be within the *letter* of that statute, if it be within the *spirit* and *intendment*. Thus, gifts for diffusing the Protestant tenets of the christian religion, and promoting public worship according to those tenets, and for providing for its ministers, &c.; bequests for the advancement of the christian religion among infidels,⁴ for the support of dissenting ministers in England;⁵ for the support of

¹ 2 Fonb. Eq., B. 2, pt. 2, chap. 1, sec. 2, note (b).

² Potter v. Chapin, 6 Paige, 649; Vidal v. Girard's Exec., 2 How. 196; The Incorporated Society v. Richards, 1 Connor & Lawson, R., 58 and S. C., 1 Dur. & War. R., 258; see also 1 Cooper's Pub. Rec., 355, Calendar of Proceedings in Chancery.

³ Story's Eq., sec. 1155; Nash v. Morley, 5 Beav. R., 177; 2 Roper on Legacies, chap. 19, sec. 1, p. 111, 112.

⁴ Att. Gen. v. College of William & Mary, 1 Ves. Jr., 245.

⁵ Waller v. Childs, Ambl., 524; West v. Shuttleworth. 2 M. & K., 696.

a preacher of a certain chapel;¹ for the repairing of parsonage houses.² For the building of a church,³ for the augmentation of poor vicarages;⁴ for paying off an incumbrance on a licensed meeting house;⁵ for the support of a burial ground;⁶ for maintaining a preaching minister,⁷ or for a Protestant dissenting chapel;⁸ for the building of a session house for a city or county;⁹ the making of a new or the repairing of an old pulpit;¹⁰ or the buying of a pulpit cloth or cushion;¹¹ or the setting up of new bells where none are; or amending them where they are out of order.¹² So a devise of money to a minister to preach an annual sermon, and keep a tomb stone and inscription in repair,¹² or for the vicar or curate of a certain place for preaching an annual sermon on a certain day;¹³ or to the singers sitting in the gallery of a certain church, to be paid on a certain day,¹³ or for benevolent and charitable purposes, with recommendation to apply it to domestic servants;¹⁴

¹ *Grieves v. Case*, 4 Bro. C. C., 67; *Att. Gen. v. Rearson*, 3 Mer., 353, 409.

² *Att. Gen. v. Bishop of Chester*, 1 Bro. C. C., 444.

³ *Att. Gen. v. Ruper*, 2 P. Wm., 125.

⁴ *Widmore v. Woodroffe*, Ambl., 636.

⁵ *Corlyn v. French*, 4 Ves., 418.

⁶ *Doc. v. Pitcher*, 6 Taunt., 363.

⁷ *Att. Gen. v. Newcomb*, 14 Ves., 1.

⁸ *Att. Gen. v. Fowler*, 15 Ves., 85.

⁹ *Story's Eq.*, sec. 1164; also, *Duke on Charities*, 105, 113; *Bridgman on Duke on Charities*, 354; *Com. Dig.*, *Charit. Uses*, No. 1; 2 *Fonb. Eq.*, B. 2, pt. 2, ch. 1, sec. 1; note (b); *Jeremy on Eq. Jur.*, B. 1, chap. 6, sec. 2, p. 238.

¹⁰ *Idem*.

¹¹ *Idem*.

¹² *Duke's Charitable Uses*, 109; 2 *Fonb.*, B. 2, pt. 2, ch. 1, sec. 2, note (b).

¹³ *Sorresby v. Hollins*, *Highmore*, 174; *Furner v. Ogden*; 1 *Cox*, 316.

¹⁴ *Miller v. Rowan*, 5 *Cl. & Fin.*, 99.

or for religious and charitable institutions and purposes;¹ for public and private charities, and to establish a life boat;² for the Welch circulating charity schools, and for the increase and improvement of christian knowledge, and promoting religion as most conducive to the said charitable purposes; and moreover, to buy bibles and other religious books to be divided among poor pious persons,³ &c., have been held to be within the spirit and intendment of that statute.

As to what would constitute a *charitable purpose* of which Chancery would take cognizance, Sir John Leach, V. C., was of opinion that funds supplied from the gift of the crown, or from the gift of the legislature, or from private gift, for any legal *public* or *general* purpose, are charitable funds to be administered by Equity; whether expressed in the statute of Elizabeth or not, provided they be within the equity thereof.⁴ In determining whether the charitable purpose is such as equity will enforce, we must look to the *source whence the trust comes*; and to the *objects* to which it is applied. As to the source, the fund must proceed from the *gift or bounty of the crown, the state, or a private individual*; thus an as-

¹ Baker v. Sutton, 1 Keen, 224.

² Johnston v. Swan, 3 Madd., 457.

³ Att. Gen. v. Stepney, 10 Ves., 22. For other authorities on this subject see note to sec. 1164, Story's Eq. (7 ed.), in which a collection of decisions is made.

⁴ Att'y Gen. v. Claphams, 31 Eng. Law and Eq., 142; Franklin v. Armfield, 2 Sneed., 305; Williams v. Williams, 4 Seld., 525; Hamden v. Rice, 24 Conn., 350; Chapin v. School District, 35 N. H., 445; Derby v. Derby, 4 R. I., 414; Price v. Maxwell, 28 Penn. St. Rep., 23; Johnson v. Mayne, 4 Iowa, 180; Att. Gen. v. Heelis, 2 S. & St., 67-76.

assessment of rates, levied under an act of Parliament, by the inhabitants of a town *on themselves*, for the improvement or benefit of their town, are not charitable funds to be administered by the court.¹ Associations of individuals for *general* charitable or *public* purposes, are charities, and within the control of the court.² But it applies only to those associations for *general* charitable or *public* purposes. Hence, associations for *mutual benevolence*, as odd fellows' societies, are not within the rule,³ while a bequest to a lodge of free-masons "for the good of the craft, or for the relief of indigent and distressed worthy masons, their widows and orphans" has been held to be a charity.⁴

The term "charitable purpose" is applied to many cases enumerated in the Statute 43, Eliz., and other cases analogous, not because they are technically charitable in their object or purpose, but because they are so named in the act.⁵ As a general rule, cases are not held to be "charitable" unless the testator has used that word to designate his general purpose, or has specified some particular purpose which the court has determined to be charitable in its nature.⁶ Hence the general principle

¹ Att. Gen. v. Heelis, 2 S. & St., 77.

² Thomas v. Ellmaker, 1 Parson's Eq., 108; Wright v. Linn, 9 Barr., 433; Penfield v. Skinner, 11 Verm., 296.

³ Babb v. Reed, 5 Rawl., 131.

⁴ Duke v. Fuller, 9 N. Hamp., 538; Volgen v. Yates, 3 Barb. Ch., 290.

⁵ 10 Ves., 541.

⁶ Morice v. Bishop of Durham, Turn. & Russ., 405; also 10 Ves., 540, 541; Story's Eq., sec. 1156; Trustees of Baptist Association v. Hart's Executors, 4 Wheat., 1, 33, 39, 43 and 45; Gallego v. Att. Gen., 3 Leigh., 450; Wheeler v. Smith, 9 Howard, 55.

by which cases are decided to be charitable since the Statute of Elizabeth, is that they must come within the letter or spirit of that act.¹ The decisions in the United States respecting the validity of devises, etc., to charitable uses, is briefly set forth in note (1), Hill on Trustees, p. 133.² In cases of individuals, where a trust is clearly created, but the

¹ Story's Eq., sec. 1155; *Nash v. Morley*, 5 Beav., 177, etc.

² "Where the principles of the statute of Elizabeth are in force in the United States, considerable latitude of construction has been adopted with regard to the certainty requisite in the description of the intended objects of charity. Thus, a devise of property to the cause of Christ for the benefit of true evangelical piety and religion, which was to be distributed in such divisions, and to such societies, and religious and charitable purposes as the trustees might think just and proper." *Going v. Emery*, 16 Pick., 107. Also a bequest to the treasurer for the time being of the American Bible Society, or of any other charitable association, for the use and purposes of said society : *Burr v. Smith*, 7 Verm., 241. So, likewise, a bequest of money to a church, to be laid out for bread yearly, for ten years, for the poor of the congregation : *Whitman v. Lex*, 17 Ser. & R., 88. Also a devise to the poor of a particular county, or parish, or town : *State v. Girard*, 2 Ired. Eq., 210; *Overseers v. Taylor*, Gilmer, 336; *Shotwell v. Mott*, 2 Sandf. Ch., 46. So also a devise to be applied to the dissemination of the gospel at home and abroad : *Att. Gen. v. Wallace*, 7 B. Monr., 611. A bequest to the New York Yearly Meeting of Friends, called Orthodox, for the use of its ministers in straitened circumstances : *Shotwell v. Mott*, 2 Sandf. Ch., 46. A devise of real and personal estate to an unincorporated religious association, to be applied as a fund for the distribution of good books among poor people in the back part of Pennsylvania, or for the support of an institution or free school in or near Philadelphia : *Pickering v. Shotwell*, 10 Barr., 23; and a residuary devise to the poor and needy, fatherless, etc., of two townships named ; *Urmy's Ex'rs v. Wooden*, 1 Ohio, St. N. S., 160; have all been supported as against the heir at law, or next of kin. So, likewise, school and educational purposes generally have been held to be charitable. See *Vidal v. Girard*, 2 How. S. C., 127; *Wright v. Linn*, 9 Barr., 433; *Hadley v. Hopkins Academy*, 14 Pick., 240; *State v. McGowan*, 2 Ired. Eq., 9; *Griffin v. Graham*, 1 Hawks., 96. So also of a legacy to a town for town purposes : *Coggeshall v. Pelton*, 7 J. C. R., 292, though see *Wheeler v. Smith*, 9 How. U. S., 55. So, likewise unincorporated fire companies and charities : *Magill v. Brown*, Bright. Rep., 350; *Thomas v. Ellmaker*, 1 Par., 98.

object is uncertain, it cannot be executed, and, consequently, the property is considered as undisposed of, and must go to whom the law gives the ownership. But if the object be "charity," the trust shall not fail. The particular mode of executing the trust will be directed by the king in some cases, and by the court in other cases.¹ The principle is this, where there is a general charitable purpose, not fixing itself upon any particular object, the disposition is in the king by his sign manual; but when the disposition is to trustees, with general objects, or some objects pointed out, Chancery will see the trust executed.²

That class of cases where the disposition is in the king by his sign manual, would fail in the United States, unless the legislature should interfere.³

In determining these cases, the following questions may be considered: 1. Is a charity, according to the letter or spirit of the Statute 43 Elizabeth, intended; and is there a trust created for such charitable purpose? 2. Is the object sufficiently defined to enable the court to undertake the execution of the trust?⁴

In England if there is clearly a trust for "general charity," and yet the gift is so indefinite that it cannot be executed by the court, or if its purpose

¹ *Morice v. Bishop of Durham*, Turner & Russ., 435.

² *Ommanny v. Butcher*, Tur. & Russ., 269; *Moggridge v. Thackwell*, 7 Ves., 36, also 1 Ves. Jr., 464; *Owens v. Missionary Society*, 14 N. Y. R., 380.

³ Willard's Eq., 580, also 596, quotes N. Y. Laws. 18 Sess., chap. 29, 2 Webster.

⁴ *Morice v. Bishop of Durham*, 9 Ves., 399, and also 10 Ves., 522.

be illegal or impossible, the trust is executed by the king under his sign manual.¹ In all such cases in the United States, the gift must fail, unless the legislature interfere, because we have no magistrate clothed with the prerogative of the crown.²

Where the bequest is clearly charitable in a general sense, that is, when the general intention of the testator in making the bequest is charitable, uncertainty as to the *persons* or *objects*, or as to *the mode of executing* the trust, will not avoid it.³ The substantial intention being charity, Equity will not permit it to fail because the formal intention as to the mode cannot be accomplished. A Court of Equity will sustain a bequest for charity, and give it effect according to its own principles, whether the persons who are to take are *in esse* or not, or whether the legatee be a corporation, capable in law of taking or not; or whether the bequest can be exactly carried into effect or not, according to the mode of the testator.⁴ Where a literal execution of the trust becomes inexpedient or impracticable, the court will

¹ *Da Costa v. Da Paz*, Ambl., 228, S. C. 2 Su., 487; *Cary v. Abbot*, 7 Ves., 490; *West v. Shuttleworth*, 2 M. & K., 697.

² Willard's Eq., 580, *Williams v. Williams*, 4 Seld., 525; *Ayres v. Meth. Ep. Church*, 3 Sandf. S. C. R., 351; *Andrew v. N. Y. Bible & P. B. Society*, 4 Sandf. S. C. R., 178.

³ Story's Eq., sec. 1181, also 1169; *Mogridge v. Thackwell*, 7 Ves., 36; *Mills v. Farmer*, 1 Meriv. R., 55; *Whitman v. Lex*, 17 S. & R., 88; *Mayor and Corporation of Philadelphia v. Elliott*, 3 Rawl. R., 170; *Zimmerman v. Anders*, 6 Watts & Serg., 218; *Am. Bible So. v. Wetmore*, 17 Conn. Rep., 181; *Inglis v. Sailor's Snug Harbor*, 3 Peters' Rep. 99.

⁴ Story's Eq., sec. 1169, also 1181; *Gower v. Mainwaring*, 2 Ves., 82-89; *Winslow v. Cummings*, 3 Cush., 365; *Tucker v. Seamans*, 7 Met., 195; *Chapin v. S. District*, 35 N. H., 445; 2 Kent's Com., 287, and note (a) 9th edit; *Zimmerman v. Anders*, *ut supra*; sec 9 Ves., 399.

execute it as nearly as it can according to the original purpose. Hence arises the *cy pres* doctrine of the court.¹

Charities are more highly favored in Equity than private legacies, as will be seen by the liberal construction of the courts in favor of charitable bequests. Thus, the same words applied to individuals in wills often require a very different construction when applied to charities. If a testator should give his property to such *person* as he should hereafter name to be his executor, and should name no one, the bequest would fail, and he would be considered intestate; but if the like bequest should be made to *charity*, the court would supply the executor, and carry the bequest into effect.² The same result would follow, should the testator appoint an executor who should die in his life time, and he should appoint no other. The court would carry out the charitable intention of the testator by supplying the place of the executor, and carrying into effect the bequest.² Upon the same principle, if the estate is devised to *such person* as the executor shall name, and no executor is appointed, or if the executor, being appointed, should die in the life time of the testator, and he should appoint no other, the bequest would fail. But if the bequest be for *general charity* under the like circumstances, it would be good, and the court would assume the office and execute the

¹ Story's Eq., sec. 169.

² *Mills v. Farmer*, 1 Meriv. R., 55-96; *Moggridge v. Thackwell*, 7 Ves., 36; *Att. Gen. v. Jackson*, 11 Ves., 365; *Chapin v. School District*, 35 N. H., 445; but see *Owens v. Mis. So. of M. E. Ch.*, 14 N. Y., 380.

trust.¹ So likewise if the trustees of a general charity should all die during the life time of the testator, the legacy would not lapse, as in case of individuals, but would be enforced in Equity.²

These decisions proceed upon the principle that it is the duty of the court to give effect to the *general intention* of the testator. And where that general intention is charity, the court will not permit mere matters of form to defeat it.³ Thus, in carrying into execution a bequest to an individual, the *manner* in which the legacy is to take effect is material; but it is otherwise in cases of *general charity*. Charity is the substance; and if the particular mode of executing it fail, the court will provide another mode by which it may be executed.⁴ So, likewise, where the mode is uncertain, or where no mode is pointed out, the court will supply the defect, rather than permit the general charitable purpose of the testator to fail.⁵

¹ See preceding note.

² Att. Gen. v. Hickman, 2 Eq. Cas. Abr., 193; Moggridge v. Thackwell, 3 Bro. Ch. Cas., 517; S. C., 1 Ves. Jr., 464; 7 Ves., 36; McCord v. O'Chil-tree, 8 Blackf., 22; Winslow v. Cummings, 3 Cush., 365; Brown v. Kelsey, 2 Cush., 243; White v. White, 1 Bro. Ch. Cas., 12; Chapin v. School District, *ut supra*.

³ Cresson's Appeal, 30 Penn. St. Rep., 437; Fink v. Fink, 12 La. An., 301; Domestic and Foreign Mis. Soc's Appeal, 30 Penn. St. Rep., 425.

⁴ Story's Eq., sec. 1167; Mills v. Farmer, *ut supra*; Moggridge v. Thackwell, *ut supra*; Att'y Gen. v. Berryman, 1 Dick, 168; Att'y Gen. v. Ironmongers' Co., 1 Craig & Phil., 208, 222, 225; S. C. 2 Beav., 313; Att'y Gen. v. The Coopers' Co., 3 Beav., 29; Att'y Gen. v. Drap. Co., 2 Beav. R., 508.

⁵ Mills v. Farmer, *ut supra*; White v. White, *ut supra*; Moggridge v. Thackwell, *ut supra*; see Att'y Gen. v. Syderfin, 1 Ver., 224; S. C. 2 Frem. 261.

In pursuance of the same general principle, the court will endeavor to execute the charitable intention of the testator even where the objects to which it is to be applied are uncertain. They hold the *substantial* intention to be charity: and therefore, the court is *substantially* executing that intention, even though it cannot do it in the *particular mode* or form directed by the testator.¹ Thus, where there was a bequest to the governors of a society for the "increase and encouragement of good servants," and no such society could be found, it was held that the gift was charitable, and therefore it should not fail.¹ So, likewise, a devise to an existing corporation by a misnomer, being charitable, is good in equity.² Upon the same principle, where the objects of charity named are impossible, the court will order a new scheme to execute it.³ This may be the case where the objects named never existed or have ceased to exist. In such cases the court will make a *cy pres* application of the funds.⁴ But, where the objects named may, though they do not at present exist, the court will reserve the fund while such possibility continues.⁵

In pursuance of the same principle, courts will

¹ *Liscomb v. Winteringham*, Eng. Law and Eq. R., 164; see *Att'y Gen. v. Earl of Winchelsea*, 3 Bro. Ch. R. 373; *White v. White*, 1 Bro. Ch. Cas., 12; *1 Congregational Society of Southington v. Atwater*, 23 Conn., 56.

² *Anon*, 1 Ch. Cas., 267; *Att'y Gen. v. Plat.* Rep. Temp. Finch, 221; *Minot v. Boston Asylum*, 7 Metc'f, 417; also, *Tucker v. Seaman's Aid Society*, 7 Met., 188; *Winston v. Cummings*, 3 Cush., 359.

³ *Story's Eq.*, sec. 1170.

⁴ *Att'y Gen. v. City of London*, 3 Bro. Ch. Cas., 171, S. C. 1 Ves. Jr., 243; *Att'y Gen. v. Ironmongers' Co.*, 2 Beav. R., 313, S. C. 1 Craig & Phil., 508, 522.

⁵ *Att'y Gen. v. Oglander*, 3 Bro. Ch. Cas., 160.

aid defective conveyances for the purpose of executing the charitable intentions of the donor.¹ But in all these cases the court acts upon the principle of giving effect to the *general intention* of the testator or donor. It is, therefore, necessary that such general intention be found to have existed, before the court will attempt to give it effect. If, therefore, it clearly appear that the testator had a *particular* object in mind, and no other, and that purpose cannot be answered, the charity must fail, and the next of kin will take.² It therefore follows, that where a *general charitable* intention in the testator or donor cannot be found, and where the objects of the particular charity are uncertain, indefinite or impossible, the trust cannot be enforced, and the fund must take the direction the law gives it.

Upon this principle, when the testatrix bequeathed the residue of her personal estate to the Bishop of Durham to dispose of the same to such objects of "benevolence and liberality as the Bishop in his own discretion shall most approve," and appointed him her executor, the residuary bequest was held to be void upon the ground that the objects of "benevolence and liberality" were not necessarily charitable.³ The language must be such as *obliges*

¹ Att'y Gen. v. Rye, 2 Vern., 453; Att'y Gen. v. Burdet, 2 Vern., 755; Mills v. Farmer, 1 Meriv. R., 55; Duke on Char. uses, 84, 85; Bridgman on Duke on Charit., 355.

² Att'y Gen. v. Hurst, 2 Cox, 354, 365; Corlyn v. French, 4 Ves., 419, 433.

³ Morice v. Bishop of Durham, Turn. & Russ., 405; S. C., 10 Ves., 540, 541; also 9 Ves., 399; Trustee Baptist Association v. Hart's Executors, 4 Wheat., 1, 33, 39, 43 to 45; Wheeler v. Smith, 9 How., 55; Story's Eq., sec. 1156; see Kendal v. Granger, 5 Beav., 300; Owens v. The M. S. of M. E. Church, 14 N. Y., 380.

the trustee to make a charitable use of the trust according to the bequest. Hence, "liberality and benevolence" are not sufficiently definite: not but they might include charity; but were they otherwise applied, could they be controlled by the court? As it is a maxim, that the execution of a trust shall be under the control of the court, it must be of such a nature that it can be; that its administration can be reviewed by the court, and if the trustee die, the court can execute it; or if there be mal-administration, the court can reform it, and direct the due administration of it.¹ Upon the same principle it was held that the words, "if there is any money remaining I should wish it to be given in private charity,"² were not sufficiently definite to create a trust. In this case, equal legacies had been given the executors, and the question before the court was, whether the executors, the crown, or next of kin were entitled to the residue. The court remarked: Had the "private charity" clause been omitted, the executors would have been trustees for the next of kin, because there never had been a case where the executors had taken the residue for their own use, where they had themselves received equal legacies.

Next, as between the next of kin and the crown, where there is a *general charitable* purpose, not fixing itself upon any particular object, the disposition is in the king by his sign manual. But it did not

¹ See preceding note.

² *Ommaney v. Butcher*, Tur. & Russ., 261, 269, etc; *Owens v. The Missionary Society of the M. E. Ch.*, 14 N. Y., 380.

belong to the king, because it was not a charity. It could not be executed by the court for it was not sufficiently definite, and a trust had been created, therefore it must go to the next of kin.

Upon the like principles the following bequests have been held void as charitable gifts. "For benevolent purposes."¹ "For charitable or other purposes."² "For benevolent, charitable and religious purposes."³ "For charitable or public purposes," or "to any person or persons" in the discretion of his executors.⁴ So likewise a gift for "schools of art," is held not to be a charitable purpose within the statute.⁵ So likewise a gift of a residue to trustees to be applied by them for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility in such modes and proportions as their own discretion might suggest, cannot be supported as a charity because the alternative objects render the trust too indefinite to be executed by the court.⁶ The general rule is this: Cases are not charitable unless the testator has used that word to denote or designate his *general purpose*, or has specified some particular purpose which the court has determined

¹ James v. Allen, 3 Mer., 17.

² Ellis v. Selby, 7 Simons, 352; and 1 Mylne & Cr., 286.

³ Williams v. Kershaw, 5 Law J. Rep. N. S., Chanc., 84.

⁴ Vesey v. Jansen, 1 Sim. & Street, 69; for this class of cases see Duke on Char. Us., by Bridgman; Com. Dig. Char. uses; Roper on Legacies, by White, chap. 19, sec. 1 to 5, p. 109 to 164; 2 Fonbl. Eq., B. 2, p. 2, chap. 1, sec. 1, note (b).

⁵ Duke Char. Uses, 128.

⁶ Kendall v. Granger, 5 Beav., 300.

to be charitable in its nature, so as to fix a charitable purpose and intent upon the testator.

Where the objects of the trust or the purposes to which the testator intends his charity to apply are illegal, the application will not be made; but if the testator has shown an intention to give to charity generally, there will be a *cy pres* application of the funds;² and this general intention must be gathered from the entire will in every case, as no general rule can be laid down.³ If the gift for charity be special, and a general charitable intent cannot be found, and the object declared be illegal, the charity will fail, and a resulting trust for the heir or next of kin will be created;⁴ but if the gift create a *general trust for charity*, the particular purpose being superstitious or illegal, will not affect the validity of the general trust; but the duty of appropriating the amount, *cy pres*, in England, devolves on the crown; in the United States, may be exercised by the legislature.⁵

¹ *Moris v. Bishop of Durham*, Tur. & Russ., 405; 9 Ves., 399; 10 Ves., 540, 541.

² *Att'y Gen. v. Green*, 2 Bro. C. C., 492; *Da Costa v. Da Paz*, Ambl., 228; *Att'y Gen. v. Baxter*, 1 Vern., 848; *Att'y Gen. v. Guise*, 2 Vern., 266; *Martin v. Margham*, 14 Simons, 230.

³ As to what is deemed a charitable intent see these cases note from Hill on Trustees, 452; *Att'y Gen. v. Bishop of Oxford*, 1 Bro. C. C., 444; S. C. 4 Ves., 431; *Att'y Gen. v. Goulding*, 2 Bro. C. C., 427; *Grieves v. Case*, 4 Bro. C. C., 67; 1 Ves. Jr., 548; *Att'y Gen. v. Whitchurch*, 3 Ves., 141; *Corbyn v. French*, 4 Ves., 418; *Att'y Gen. v. Davies*, 9 Ves., 535; *Att'y Gen. v. Hinxman*, 2 J. & W., 270; *De Themines v. De Bonneval*, 5 Russ., 288; *West v. Shuttleworth*, 2 M. & K., 684, 698; *Att'y Gen. v. Grocers' Co.*, 12 Law Jour. N. S., Chanc., 196; 6 Beav., 526.

⁴ *West v. Shuttleworth*, *ut supra*; *De Themines v. De Bonneval*, *ut supra*.

⁵ *Willard's Eq.*, 580; *Ayers v. The Meth. Epis. Ch.*; 3 Sandf. S. C. R., 351; *Andrew v. N. Y. Bible and Prayer Book Soc.*, 4 Sandf. S. C. R., 178.

It has been claimed that a "pious use" cannot be sustained by a court of justice in a country where the truths of religion have not been settled and defined by law, or where the judges have not the discretionary power to determine and declare them. The judge, in the case of *Andrew v. The New York Bible and Prayer Book Society*,¹ held, "that under a Constitution which extends the same protection to every religion, and to every form and sect of religion, which establishes none and gives no preference to any, there is no possible standard by which the validity of a *use as 'pious'* can be determined." That "there are no possible means by which judges can be enabled to discriminate between such uses as tend to promote the best interests of society, by spreading the knowledge and inculcating the practice of true religion, and those which can have no other effect than to foster the growth of pernicious errors, to give a dangerous permanence to the reveries of a wild fanaticism, or encourage and perpetuate the observance of a corrupt and degrading superstition." But this reasoning of the court was fallacious, because the principles upon which it was based were fallacies. A court does not endorse the theological opinions of the Methodist, Episcopalian, the Presbyterian or Catholic, by sustaining a gift as a charity to such denominations. The court does not try the "*validity of a pious use*" by the legal orthodoxy of the sect for whose benefit it is given; and Judge Willard well remarks,² "The only limit

¹ 4 Sandf. S. C. R., 178.

² Willard's Eq., 577-596; *Miller v. Gable*, 2 Denio, 524.

to toleration is at a point where licentiousness, or practices inconsistent with the peace and safety of the state commence; and it is the province of the court to determine, incidentally indeed, but no less decisively, when that point has been reached." The like principle is sustained in the case of *Williams v. Williams*.¹ A religious denomination whose essential tenets inculcated practices prohibited by the laws of the state, as bigamy, by the Mormons, would not probably be encouraged; and a gift for the purpose of promulgating such tenets, would most probably be deemed illegal.² The doctrine of charities in the United States is substantially the same as in England, in all that class of cases where they can be administered by the court without the aid of the crown;³ and in that class of cases where the sign manual of the king is necessary, the gift would fail, and a trust would result to the heir at law or next of kin, unless the legislature interfere to give it effect.⁴ The general law of pious and charitable uses has been declared to be in force in the United States in those cases where gifts and devises are made to trustees capable of taking the legal estate, and the objects of the trust are definite;⁵ as devises for the support of the poor of a town,⁵ or for the

¹ 4 Selden N. Y. Ap'ls, p. 525.

² See *Terrett v. Taylor*, 9 Cranch, 43; *Andrew v. N. Y. B. and P. B. Society*, 4 Sandf. S. C. R., 184; *Willard's Eq.*, 578.

³ *Will. Eq.*, 579; *Vidal v. Girard's Executors*, 2 How., 127; *Ingles v. Trustees of Sailor's Snug Harbor*, 3 Peter's R., 99; *Executors of Burr v. Smith*, 7 Vert., 241; *Going v. Emery*, 16 Pick. 107; *McCarty v. The Orphan's Asyl.*, 9 Cowen, 437.

⁴ *Will. Eq.*, 596; 4 Kent's Com., p. 508.

⁵ *Williams v. Williams*, *ut supra*; *Shotwell v. Mott*, Sand. Ch. R., 46.

benefit of an unincorporated religious society,¹ or for the support of the minister of a church and his successors in office,² or for the maintenance of a school, or for the erection of a hospital.³

Courts of Equity disclaim all rights to interfere with the religious beliefs of any person, or to prevent the full enjoyment, by every citizen, of all the rights of conscience secured by the Constitution. They act upon the principle that the will of the testator shall be carried out as far as possible, consistent with the proper application of those rules of law which govern in the state. Consequently, they will not permit funds devoted to a particular charity by the testator to be devoted to other objects, even if those for whose use it was given should concur in such diversion.⁴

So also where property is conveyed to a religious society or corporation to promote the teaching of particular religious doctrines, on proper application the court will interfere to prevent a diversion of those funds for the purpose of teaching different doctrines; and it is no defence to set up that the deviation from the faith or doctrine to which the property is devoted is sanctioned by a majority of the society.⁵ "In every case of charity," said Lord

¹ *Shotwell v. Mott*, Sand. Ch. R. 46; *Williams v. Williams*, *ut supra*.

² *Dutch Church v. Mott*, 7 Paige 77.

³ *Fink v. Fink*, 12 La. An., 301.

⁴ *Miller v. Gable*, 2 Denio, 492, 541; S. C. 10 Paige, 627; *Kinskern v. Lutheran Church of St. Johns*, 1 Sandf. Ch. R., 439; *Field v. Field*, 9 Wend., 394; *Robertson v. Bullions*, 9 Barb., 132.

⁵ *Miller v. Gable*, 2 Denio, 492; *Mann v. Ballet*, 1 Verm., 43; *Att. Gen. v. Gleg*, 1 Atk., 356; *App. v. Lutheran Cong.*, 6 Barr., 201.

Lyndhurst, "whether the object of the charity be directed to religious purposes or those purely civil, it is the duty of the court to give effect to the intent of the founder, provided this can be done without infringing any known rule of law."¹ Where a testator makes a gift to general or special charity, and designates as the object the inculcating of certain religious tenets by a certain society or corporation, it is evident that the gift is for the benefit, not of the individuals themselves, but of the cause they represent; and, when they cease to represent the cause which was the object of the trust, they cease to be entitled to control the trust. Thus, a gift to a Unitarian society, to be used for the promulgation of the cause of Unitarianism, by inculcating its tenets, doctrines, etc., is a gift to the cause of Unitarianism; and, should such society cease to be Unitarian in faith and teaching, they would cease to represent the objects of the charity, and hence would cease to be entitled to control the trust.¹

Connected with the doctrine of trusts for charitable purposes is that which is technically called *cy pres*.² The doctrine of *cy pres* is based upon the principle that the court will, as far as possible, give effect to the intention of the donor or testator. Therefore, where the intention of the testator has impressed the gift with the character of a fund for charity,

¹ Att. Gen. v. Shore, 7 Sim., 290; Shore v. Wilson, 9 Clark and Fin., 355; Att. Gen. v. Pearson, 11 Sim., 592; see Brown v. Lutheran Church, 23 Penn. St., 493; Gable v. Miller, 10 Paige, 647; Field v. Field, 9 Wend., 394; Trustees v. Sturgeon, 9 Barr., 322; see Hill on Trustees, (3 ed.), 467, note (1), authorities cited.

² Gilman v. Hamilton, 16 Ill., 225.

and the literal execution thereof, according to the intention of the testator, becomes impossible or impracticable, the court will execute it as nearly as possible according to the original purpose.¹ Thus, where there was a bequest of £1000 “to the Jew’s Poor, Mile End,” and it appeared that there were two charitable institutions for Jews at Mile End, and it not appearing which of the two was intended, the court held that the fund ought to be applied *cy pres*, and so divided the bequest between the two institutions.² Where a charity is given, and there can be no objects of the precise character specified, or where the objects named fail, the court will make a *cy pres* application of the charity. Thus, in the case of the *Att’y Gen. v. The Ironmonger’s Company*,³ the testator had bequeathed the residue of his estate to the company to apply the interests of a moiety “unto the redemption of British slaves in Turkey or Barbary,” one-fourth to charity schools in London and its suburbs, and one-fourth toward necessitated freemen of the company. There were no British slaves in Turkey or Barbary to redeem, and the court directed the Master to provide a new scheme *cy pres*, and finally the court approved a scheme giving the moiety of the charities to the

¹ Story’s Eq., sec. 1169, 1170; *Att. Gen. v. Iron Mongers Co.*, 2 Beav. R., 313; *Att. Gen. v. Oglander*, 3 Bro. Ch. Cas., 166; *Att. Gen. v. Boulton*, 2 Ves. Jr., 380; *Bridgman on Duke on Charitable uses*, 355; *Bap. Ass. v. Hart’s Executors*, 4 Wheat. R., 1; S. C., 3 Peters R., 481; *Hill on Trustees*, 462; *Att. Gen. v. Wansay*, 15 Ves., 231.

² *Bennett v. Hayter*, 2 Beav. R., 81; 1 *Congregational Society of Southington v. Atwater*, 23 Conn., 56.

³ 2 Beav. R., 313; *Att. Gen. v. Bowyer*, 3 Ves., 714; *Bishop of Hereford v. Adams*, 7 Ves., 324; *Att. Gen. v. Whitechurch*, 3 Ves., 141; *Beckman v. The People*, 27 Barb., 260.

other fourth parts, as being *cy pres* to that which failed. Lord Langdale said: "With respect to the order of reference, it is necessary that some construction should be given to it: and I am of the opinion, that the master was bound to consider whether there could be a *cy pres* application for the first purpose before he considered the propriety of the application to the second purpose. Where a fund is to be disposed of *cy pres*, the court, for the sake of making a disposition, is bound to act upon the suggestions which are before it, however remote, and it is rather astute in ascertaining some application in conformity, more or less, with the intention of the testator." This case came before Lord Cottenham on appeal, and was somewhat modified by him;¹ on which occasion he said: "It is obviously true that if several charities be named in a will and one fail for want of objects, one of the others may be found to be *cy pres* to that which has failed, and if so, its being approved by the testator ought to be an additional recommendation; but such other charity ought not, as I conceive, to be *preferred* to some other more nearly resembling that which has failed. That point, however, is not open upon the present report, which was made under an order directing the master in settling a scheme to have a regard, as near as may be, to the intention of the testator as to the bequest contained in his will touching British captives, and having regard, also, to the other char-

¹ 1 Craig & Phil., 508, 522; Att. Gen. v. Bishop of Landaff, cited 2 Mylne & Keen, 586; 2 Beav. R., 517; Mills v. Farmer, 19 Ves., 483.

itable bequests in said will. By this I understand that the first subject to be considered is the intention of the testator, to be discovered from the gift in favor of British slaves; subordinately to which, and, if possible consistently with it, the other charities are to be considered; and this, I conceive, would have been the course to be pursued, if there had not been any such special directions. Assuming this to be the rule, it appears that the first charity is most general in its objects, being applicable to all British subjects who should happen to be in a particular situation; and the second is limited to persons in London and its suburbs; and the third is confined to freemen of a particular company in London. It would seem, therefore, that although there is no possibility of benefiting the British community at large in the mode intended by the testator, none being found in the situation he anticipated, that it would yet be more consistent with his intention that the same community should enjoy the benefit of his gift in any other way than that it should be confined to any restricted portion of such community. In considering the manner in which such benefit should be conferred, it is very reasonable and proper to look to other provisions in his will, in order to see whether he has indicated any preference to any particular mode of administering charity. If a testator had given part of his property to support hospitals for leprosy in any part of England, and another part to a particular hospital, it would be reasonable to adopt the support of hospitals as the mode of applying the disposable funds;

but there would not be any ground for giving the whole to any particular hospital. To assume, because a testator names two charities in his will, that he would have given the amount of both legacies to one if he had foreseen that the other could not be carried into effect, and, therefore, to give the provision intended for the object which fails to the other, is, or may be, totally inconsistent with the doctrine of *cy pres*. The two objects may be wholly unconnected, and there may be other charities closely connected with that which the testator intended to favor. But, as indicative of the testator's general views and intentions, it may be very proper to observe the course he has pursued in his gifts to other charities. I think, therefore, that, in the absence of any objects bearing any resemblance to the object which has failed, it is very proper to look to the second gift, but only as a guide to lead to what the testator would probably have done himself, and, therefore, not to be followed further than may be proper to attain that object. But with regard to the third object I cannot see any grounds for considering it as indicative of the testator's general views, or any reason for supposing that he would, under any circumstances, have wished that provision increased. The objects are restricted within the narrowest limits, and it is, in that respect, in direct contrast with the extended nature of the first gift. But what appears to me to be conclusive against any reference to the third gift is, that the testator has expressed his reasons for the gift, which can have no application to the moiety undisposed

of. He says that the third gift is in consideration of the company's 'care and pains' in the execution of his will. It is true that this compensation is given to the company in the shape of a provision for necessitous decayed freemen of the company, their widows and children, and no doubt is a charity. But in looking for evidence of the testator's *general* views and intentions, with reference to the *kind* of charities to be favored, it cannot be inferred that he preferred the distressed freemen of the company to all others because he made a provision for them in consideration of services to be performed by the company; and this consideration has already increased in a greater ratio than the income of the property, it being well known that a large property may be administered at a less percentage than a small one. I am, therefore, of the opinion that this third gift cannot be referred to for any purpose in settling a scheme for the application, *cy pres*, of the funds intended for the first. But I think the most reasonable course to be adopted is to look at the second gift as indicative of the kind of charity preferred by the testator, but making it as general in its applications as the first was intended to be, that is, open to all who might stand in need of assistance; which leads to this conclusion, that it should be applied to the support of charity schools, without any restriction as to place, where the education is according to the church of England, but not exceeding £20 per year to any one."¹

¹ Att. Gen. v. Ironmonger's Company, 1 Craig. & Phil., 508.

Judge Story, in his Equity Jurisprudence,¹ remarks, that “the doctrine of *cy pres*, as applied to charities, was formerly pushed to a most extravagant length. But this sensible distinction now prevails that the court will not decree the execution of the trust of a charity in a manner different from that intended, except so far as it is seen that the intention cannot be literally executed. In that case, another mode will be adopted consistent with the general intention, so as to execute it, although not in mode, yet in substance. If the mode should become, by subsequent circumstances, impossible, the general object is not to be defeated if it can in any other way be obtained. Where there are no objects remaining to take the benefit of a charitable corporation, the court will dispose of its revenues by a new scheme upon the principle of the original charities *cy pres*. A new scheme will not be ordered, however, if the institution is a permanent one, and the object of the testator was to benefit that institution generally, although the particular trustee named may have died in the lifetime of the testator; but the legacy will be ordered to be paid over to the proper officer of the institution.”¹

Where lands are given to a corporation for charitable uses, which the donor contemplates to last forever, the general rule is, the heir must be forever excluded; and, should the execution of the charity become impracticable as expressed by the donor, the

¹ Story's Eq., sec. 1176; *Walsh v. Gladstone*, 1 Phil. Ch. R., 290; *Att. Gen. v. Boulton*, 2 Ves. Jr., 380, 387; *S. C.* 3 Ves. Jr., 220; *Beekman v. The People*, 27 Barb., 260.

court will substitute a similar one *cy pres*,¹ and if the trustee or corporation fail, the court will substitute itself in their stead and execute the trust.¹

It is to be observed that the trustees of a charity are not authorized to make a *cy pres* application of the funds on their own authority. When the particular purpose expressed by the donor fails or becomes impracticable, so that it cannot be effectuated, recourse must be had to the courts for the purpose of elaborating a proper *cy pres* application. The court will direct the master, upon due enquiries and evidence, to devise a scheme for the execution of such charitable intent, which the master ultimately reports to the court for its sanction.² But where a scheme has been approved by the Attorney General, it seems that a report of the master is unnecessary.³

It has been held that the doctrine of *cy pres*, as applicable to charitable bequests, is not in harmony with the genius of our institutions in this country, and therefore not in force.⁴ But Willard, in his Equity, thinks that there is a limited application of the *cy pres* doctrine in the case of *Williams v. Williams*,⁵ and it is not clear to perceive any substantial

¹ Story's Eq., sec. 1177; *Att. Gen. v. Wilson*, 3 Mylne & Keen, 362, 372; *Att. Gen. v. Hicks*, High, on Mortmani, 336, 353.

² Hill on Trustees, 462.

³ *Att. Gen. v. Earl of Mansfield*, 14 Sim., 601.

⁴ *More v. More*, 4 Dana K. Rep., 357; *Methodist Church v. Remington, et al.*, 1 Wall's Rep., 226; *Magill v. Brown*, Bright's R., 350; *Ayers v. Meth. Ep. Ch.*, 3 Sandf. S. C. R., 351; *Yates v. Yates*, 9 Barb., 324, 329; *Voorhees v. Presby. Ch. Amst.*, 17 Barb., 105.

⁵ 4 Selden N. Y. Ap., 525; Will. Eq., 594; *Andrew v. N. York Bible and P. B. Society*, 4 Sandf. S. C. R., 156; *The Incorporated Society v. Richards*, 1 Com. & Law. R., 58.

reason why the *cy pres* doctrine may not be applicable to a certain class of cases which may arise in any country where the principles of the statute for charitable uses are recognized as inhering in the common law jurisdiction of courts of equity.¹ Chancellor Kent thinks that the statute 43 Elizabeth did not intend to give any new validity to charitable donations; but rather was designed to provide a new and more effectual remedy for the breaches of those trusts.² The statute *defined* the charities which chancery would protect, and which were to be enforced; but it left the jurisdiction of chancery as it existed prior to it, untouched.³ Although the statute of charitable uses was not extended to Pennsylvania, yet the principles of that statute have been adopted by their courts, and they give relief in all cases where their means admit of it, nearly to the same extent as does chancery in England.⁴

In New York, the constitution of 1777, adopted

¹ See preceding note.

² 2 Kent's Com., 288.

³ Story's Eq., sec. 1162, 1163; Incorporated Society v. Richards, 1 Connor & Lawson, 58; S. C., 1 Don. & War., R., 258; Will. Eq., 571, 572; Whitman v. Lex, 17 Serg. & Raw., 88; Mayor, &c., Philadelphia v. Elliott, 3 Rawle's R., 170; Magill v. Brown, (Zanes case), Bright R., 350, 412.

⁴ Whitman v. Lex, *ut supra*; Zimmerman v. Anders, 6 Watts. & Serg., 220; see A. B. So. v. Wetmore, 17 Con. R., 181; Moore v. Moore, 4 Dana K. R., 357; Potter v. Chapin, 6 Paige Rep., 639; Dutch Church, &c. v. Mott, 7 Paige, 77; Executors of Burr v. Smith, 7 Verm. Rep., 241; Sanderson v. White, 18 Pick., 328; Inglis v. The Sailor's Snug Harbor, 3 Peters' U. S. Rep., 99; Bartlet v. Ney, 4 Metcalf R., 378; see 1 Hoffman's Ch. Rep., 202, where it is discussed and authorities cited. The doctrine of *cy pres* is recognized and applied in the State of Kentucky; see Gass & Bonta v. Wilhite, 2 Dana K. Rep., 170.

as the law of the State such parts of the common law of England and of the statute law of England and Great Britain, as together formed the law of the colony of New York, on the nineteenth day of April, 1775, subject to such alterations and provisions as the legislature from time to time should make concerning the same.¹ The legislature in 1788, enacted, that from and after the first day of May, 1788, none of the statutes of England or Great Britain should operate or be considered as laws of that State. So far then as the law of *charitable uses* was a part of the common law of England, it became the law of the State of New York, unless, as observed by Judge Willard,² “there was something in the system repugnant to our form of government; or unless it was not in force prior to the Revolution; or unless abolished by the Revised Statutes.” We have already seen that it is now held, both in England and America, that the law of charitable uses is a part of the common law of England, and that the statute of the 43 Eliz. was not designed to confer any new jurisdiction upon the Court of Chancery;³ that it introduced no new principles, but was designed to afford a new and less dilatory method of establishing charitable donations, and to correct other abuses in relation to them.⁴

In the absence of any provision in the colonial

¹ Const. 1777, sec. 35; see also constitutions of 1821 and 1846, for same provisions.

² Will. Eq., 573.

³ 2 Kent's Com., 287 and 288, note (b), 9th ed.

⁴ Will. Eq., 572; 9 Cow., 470; 2 Kent's Com., 288.

statutes, or any decisions in the colonial courts adverse to the common law principles of the law of *charitable uses*, it might very properly be inferred, that, as a part of the common law of England, it was the law of the colony of New York prior to the nineteenth day of April, 1775. But, in the language of Judge Willard,¹ “we are not without evidence of undisputed authority that the English doctrine of charities was considered in force in the colony of New York prior to the Revolution.” In a manuscript volume of the orders of the Court of Chancery under the colonial government, which is preserved in the office of the clerk of the Court of Appeals, there is found a record of the proceedings in a case determined in that court, held before the Governor and council, in the year 1708, which bears directly upon the question. The Attorney General filed an information against William Cullen, to compel the payment of seventy-five pounds bequeathed by one Nicholas Cullen, for the benefit of the poor of New York, and twenty-five pounds to those in Albany. The bill of complaint alleged that the defendant, under a power of attorney from the executor in England, had possessed himself of the testator’s estate in the colony, out of which, according to equity, he ought to have paid the legacies aforesaid, *forasmuch as the said legacies were given to pious and charitable uses, and as the preservation of charitable uses is of great public benefit and great concern to our lady, the Queen, and the poor aforesaid, in*

¹ Willard’s Eq., 574.

consideration whereof, “the Attorney General prayed that the defendant might answer and be decreed to pay the amount, &c. The defendant answered, and the cause being heard upon the pleadings, a decree was made that he should pay the trustees the amount of the legacies to be distributed to the poor according to the will of the testator.”¹ It will not be claimed that the law of charitable uses is repugnant to republican and christian institutions, for, in the language of Mr. Kent,² “the administration of justice in this or any other country, would be extremely defective if there was not power to uphold such dispositions,” (to charitable uses). There is nothing in the Revised Statutes which conflicts with the general law of charitable uses. By that statute,³ it is provided, that no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute, to take by devise. But this statute only excepts *corporations unauthorized*, from the description of competent devisees; but there is nothing in the statute declaring it unlawful for a corporation to take *for a charitable use*; and Mr. Kent says, they are left in the same state as if the Statute of Wills had not been passed.⁴

In the case of the Orphan Asylum Society *v.* McCartee,⁵ Chancellor Jones held that a devise of

¹ See preceding note.

² 11 Conn., 285.

³ 2 R. S. 57, sec. 2, 3, Stat. of Wills; see Hornbeck's Ex'rs *v.* Am. Bib, So., 2 Sandf. Ch. R., 133; Banks *v.* Phelan, 4 Barb., 80.

⁴ Kent's Com., 286.

⁵ 9 Cowen, 469; 2 Kent's Com., 286, and note to 288.

lands to executors, in trust for a *charitable corporation*, for *charitable purposes*, was a *legal and valid trust to be enforced in equity*. And Mr. Kent, in referring to this opinion of Chancellor Jones, sustains it by quoting the authority of Lord Northington in the case of *The Attorney General v. Tancred*,¹ in which he affirmed, that devises to corporations, though void under the Statute of Wills, were always considered good in equity if given to *charitable uses*; and that the uniform rule of the court of chancery, *before* as well as after the statute of Elizabeth, was that *where the uses were charitable, and the grantor competent to convey*, the court would aid even a defective conveyance to uses."¹ It can hardly be doubted that the common law doctrine of *charitable uses* is the law of the State of New York upon that subject, where the statute has not provided to the contrary. Then why may not the *cy pres* doctrine as administered by the court of chancery in England, in virtue of its common law jurisdiction, be equally applicable in the State of New York. There does not appear to be any valid reason why a court of equity in the State of New York, having a common law jurisdiction over questions of *charitable uses*, should not have authority to

¹ 1 Edw. R., 10, and 1 Wm. Black., 91; see also 2 Kent's Com. 287, note (a), 9th ed; see also the opinion of Judge Duer, in case of *Andrews v. N. Y. Bible & P. B. S.*, 4 Sandf. Sup. C. R., 184; also *Vander Volgen v. Yates*, 3 Paige, 242; *Williams v. Williams*, 4 Selden, 525; see Lord Eldon in *Att. Gen. v. The Skinner's Com.*, 2 Russ., 416; also, Sir John Leach in *Att. Gen. v. The Master of Brentwood School*, 1 Myl. & Ke., 376, and Lord Redesdale, 1 Blight's R., N. S., 347; *Shotwell v. Mott*, 2 Sandf. Ch., 46; *Potter v. Chapin*, 6 Paige, 639.

administer in that *class* of cases in which a court of equity in England could, without the aid of the royal prerogative: that is, in all cases, except where there is a general charitable purpose not fixing itself upon any particular object, or where the charity which is appointed is illegal or impossible. The rule in England is, *if there is clearly a general charity, and yet the gift is so indefinite that the court cannot execute it, or if the purpose be illegal or impossible*, the trust is executed by the King under his sign manual.¹ But in all cases where the subject and object are sufficiently definite to enable the court to execute the trust, and the purpose is legal and possible, chancery has original and necessary jurisdiction.²

In the case of *Owens v. The Missionary Society of the Methodist Episcopal Church*,³ Mowbry Owens, by his will, directed his property real and personal to be sold, by his executors. One third of the proceeds he gave to his wife in lieu of dower. After two bequests, amounting to \$150, he directed the residue of his estate to be invested during the life

¹ *Da Costa v. Du Paz*, Amb. 228; 2 Sw., 487; 7 Ves., 490; 2 M. & K., 697.

² 2 Kent's Com., 287, and note; see *Ld. Chancellor Sugden, in Incorporated Society v. Richards*, 1 Con. & Law., 58; and also 1 Dow. & War. R., 258; *Chancellor Walworth, in 7 Paige*, 80; *Ld. Hardwick, in 2 Ves.*, 327; see *Owens v. The Missionary Society of the M. E. Church*, 14 N. Y., 380; and the opinion of Selden, J., in which he traces the history of the law of charitable uses, and is of the opinion that the peculiar features of that law have their origin in the statute 43 Elizabeth. See Denio, J., in the same case. He thinks the legal question before the court has been settled in New York, and should be permitted to stand.

³ 14 N. Y. R., 380.

of his wife, and the interest to be paid to her. And after the death of his wife, he gave the residue of his estate to the Methodist General American Missionary Society appointed to preach the gospel to the poor, L. C. The testator died in 1834. His widow died in 1851. There was a residue of \$1436.52 in the hands of the surviving executor. The next of kin of the testator claimed the residue. The Missionary Society of the Methodist Episcopal Church was incorporated in 1839. The object of the incorporation was declared in the act to be "to diffuse more generally the blessings of education, civilization and Christianity throughout the United States and elsewhere." In 1819 or 1820, a voluntary unincorporated association was formed under the patronage of the Methodist Episcopal Church, known by the same name, and it continued and carried on its operations under the control of the church until the appellants were incorporated in 1839. The surrogate found that the testator intended his bequest to this voluntary association, and adjudged it to them. Owens and others, next of kin, appealed to the Supreme Court, where the decree of the surrogate was reversed. The M. S. of the M. E. Ch., appealed to the Court of Appeals, where the decision of the Supreme Court was affirmed. Selden J., in giving the opinion of the court, argued and held that the doctrine of *charitable uses*, as administered in England, was derived from the 43 Elizabeth, and as such, was not in force in New York, and hence, sustained the decree of the Supreme Court. Denio C. J. based his opinion upon the principle that the

object was so indefinite that it could not be executed by the court, and hence the use must fail.¹ Clearly, this bequest lacked all the essential elements of a charitable bequest, whether the doctrine of charitable uses be derived from the 43 Elizabeth, or from the principles of equity as administered at common law. The purposes and objects of the bequest were too vague and indefinite to enable the court to enforce its execution.

Where there is a bequest of property to an incorporated institution, capable of holding under its charter, real and personal property, it is no objection that the bequest may create a perpetuity.²

In the case of *Beekman v. The People*, recently decided in the Supreme Court of New York,³ Barthop, by a codicil, dated May 12, 1838, and another of October 13, 1838, made the following bequest: "After the expiration of ten years, or sooner, if there be sufficient funds, I would wish a public dispensary, as in New York, on a similar plan, for indigent persons, both sick and lame, to be attended by a physician elected to the establishment, at their own homes, and also daily at the dispensary. My executors to consult judicious men in Albany, respecting the same, and funds enough to carry on the

¹ But see *Vidal et al. v. The Citizens of Philadelphia*, 2 How. Rep., 127; see the calendars of proceedings in Chancery in the town of London, printed by the direction of the Record Commission in 1827. By this it appears that charitable uses might be enforced in Chancery, upon the principle of the general jurisdiction of the court independent of the statute of Elizabeth, etc.

² *Auburn T. S. v. Kellogg*, 16 N. Y. R., 83; see also *Williams v. Williams*, 4 Seld., 525; 4 Seld., 558.

³ 27 Barb., 260.

building and yearly expenses. And should there be any overplus, my executors, within fifteen years, may give it to any other charitable society or societies for relieving the comfortless and indigent they may select. I say within fifteen years from my death. I say it is my will that my executors have a discretionary power, or a majority of them, within fifteen years after my decease, to pay over what remains, after all legacies are paid, the residue and remainder of moneys arising from my worldly goods and effects, to such charitable societies for indigent and respectable persons, especially females and orphans, as they in their discretion shall think of." By the codicil of October 13, 1838, before any money was appropriated for the establishment of a dispensary, as provided for in the preceding codicil, he gave to his executors in trust the sum of \$19,000, to be appropriated in their discretion to certain societies, which, it has since been ascertained were not in existence at the death of the testator, and he added, after such provision, these words: "But should my executors be of the opinion, at any time, that any or either of said societies do not merit the provision aforesaid, for their benefit, by reason of mismanagement or negligence, or for any other cause, then and in that case it is my will, and I direct that the moneys then remaining unpaid shall be withheld, and that they shall pay and apply the same to any other charitable society or societies, incorporated or not, which my said executors shall, in their discretion, think proper, reposing full confidence in my executors that they will endeavor to

carry into effect my intentions in regard to the disposition of said moneys." * * * "And in the second place, after satisfying the provisions in my will in regard to the dispensary mentioned in my will, in the first codicil thereto, I give and bequeath all my estate then remaining, if any there shall be, to my executors, in trust, that they shall and may apply the same in such sums, and at such time and times as, in their discretion, they shall think fit and proper, to the treasurer or other officer having the management of the pecuniary affairs of any one or more societies for the support of indigent respectable persons, especially females and orphans, and for the use of said society or societies, hereby intending to give to my executors discretionary power as to the disposition of the same, *but so that the same shall be applied to objects of charity.*"

In this case the court held that the bequest, to be effectual, imposed the necessity of creating a trust in lands of a nature prohibited by the statute regulating uses and trusts, and was therefore null and void. The argument of the court was on this wise: The establishment of the dispensary, according to the terms of the will, necessarily involves the purchase of a site and the erection of a suitable building. The terms used by the testator, in expressing his intention, necessarily imply a direction to purchase land on which to build, and the estate is given to his executors for the purpose thus indicated; which, being in contravention of the statute regulating uses and trusts, is illegal and void.

As this case has gone to the Court of Appeals,

and is not yet decided there, it is unnecessary to enter upon a critical review of it. The court based the decision upon English authorities, which hold that a devise or bequest which necessarily involves the purchase of real estate by executors or trustees, in trust for religious or charitable purposes, is void, as being in contravention of 9 George II, chap. 36, known as the Mortmain act. The authorities cited¹ are numerous and satisfactory upon that point. The rule deducible from them seems to be, that "a true construction of the statute 9 George II, chap. 36, is, '*that a bequest is void which tends to bring fresh lands into mortmain*;' and also that a bequest of money, to be expended in the erection or repair of buildings, is void, unless the testator *expressly* states in his will his intention that the money so bequeathed is to be expended on some land *already in mortmain*.'"² The judge, in giving the decision in this case, remarked: "Such provisions as are contained in this will would be clearly void in England, *as being in contravention of the mortmain act*. But, as that statute is not in force in this state, are they in conflict with other statute regulations? The statute of this state, regulating uses and trusts, declares that all uses and trusts, except as therein authorized, are abolished; and a reference to them shows that

¹ Chapman v. Brown, 6 Ves., 404; Att. Gen. v. Tyndall, Ambl., 614; Att. Gen. v. Hutchinson, Ambl., 751; Pelham v. Anderson, 1 Bro. C. C., 444; Foy v. Foy, cited 3 Bro. C. C., 591; Att. Gen. v. Nash, 13 Bro. C. C., 588; Fry v. The Corporation of Gloucester, 14 Beav., 196; Att. Gen. v. Hall, 9 How., 647.

² See the history of the rise and progress of the acts called Mortmain, in 2 Black. Com., 268.

they cut off all trusts except those which are expressly authorized, and that this trust is not so authorized," and therefore the court held the bequest void.

The premises and the conclusion of the court in this case, are not necessarily related to each other ; at all events there is not that inevitability of relationship which makes the conclusion altogether satisfactory. The authorities cited had but little bearing upon the question before the court. In England, the statute of mortmain was enacted to prevent, among other things, that which is necessarily involved in such a bequest—*the bringing of fresh lands into mortmain*, without license from the crown. Therefore, such a bequest is not only against the *letter* but also, against the *spirit and intendment* of that statute. It involves necessarily that, which those statutes were carefully and persistently framed to prohibit and prevent. The history of the rise and progress of the mortmain acts,¹ show that there never has been, and, probably, never can be *occasion* for the enactment of any such statute in the State of New York. The bequest, then, is not void because it involves the doing of that which would be in contravention of a *mortmain act*.

The laws of New York *favor* the establishing of religious and charitable corporations, by the facilities they afford for such purposes. So far from passing a mortmain act, they have enacted general laws by which religious and charitable associations

¹ See 2 Black. Com., p. 268.

may become self-incorporated, and endowed with the prerogatives of perpetuity and personality; empowered to receive, hold and pass estates, real and personal, limited in amount, for the legitimate purposes of their existence. The bequest, then, has for its object that which is in harmony with the spirit and intendment of the *general* laws of the State of New York. But it is said by the court, the bequest involves, necessarily, acts in contravention of the statute of New York regulating uses and trusts; inasmuch as it necessarily contemplates the purchase of real estate, which is to be held in trust for the purpose of the charity contemplated, and that such trust is not authorized by the statute.

The statute of New York regulating trusts was not enacted in hostility to the principle of creating trusts, nor does it intend to prevent their existence in cases needful and proper. It is held by the courts that the aim of the statute was to abolish mere *passive* or *dry trusts*.¹ It aimed not at *destroying* the interest of the *cestui que trust*, but at uniting the legal and equitable estates in him in all cases where it could consistently be done.² But where that could not be done, because of interests which might require protection, or where there were active duties to be performed by a trustee, making

¹ Will. Eq., 415; Johnson v. Fleet, 14 Wend., 166; 1 Rev. St., 727, see. 48.

² Wright v. Douglass, 3 Seld., 564; Baker v. Devereaux, 8 Paige, 513; Bard v. Foot, 3 Barb. Ch., 632; Frazee v. Western, 1 Barb. Ch., 220; Parks v. Parks, 9 Paige, 107; Rawson v. Lampman, 1 Seld., 456; Voorhees v. Pres. Ch. of Amsterdam, 8 Barb., 135; Ring v. McCoun, 6 Seld., 268.

the legal estate in him essential to their proper performance, the law intended a trust should subsist, or that which was equivalent thereto.¹

Therefore, the statute proceeded to authorize express trusts in that class of cases where the needs of society seemed most to demand them; and then, to provide, that where express trusts should be created for any other purpose not enumerated in the act, directing or authorizing the performance of any act which might be lawfully performed under a power, although not valid as a trust to vest in the trustee, a *legal estate*, it should, nevertheless, be valid as a power; and the power in trust thus raised, should be imperative, unless expressly provided otherwise, and, like a trust, be enforceable in equity.

The statute then, defines a power to be an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power, might himself lawfully perform.

It is obvious that the statute does not seek to *prohibit* the raising of trusts as a principle. It seeks to do away with mere *useless or dry* trusts, by *executing the use* in the *cestui que trust*, not by *depriving him of it*. The bequest was not in contravention of the *spirit or intendment* of the law of New York abolishing uses and trusts.

A trust raised for the purpose of establishing a charity such as this dispensary was conceded to be,

¹ 1 Rev. St., 727, sec. 47 and 48.

is in harmony with the spirit, not only of the *general* laws of the State, but also of the *particular statute* said to be contravened. Had the testator in his lifetime given the money to the trustees, to be expended for such a purpose, or had he executed to them deeds in trust for such an object, who can doubt it would have been valid as a power in trust? And although the legal title would not have vested in the trustees, yet it would have descended to the heirs or personal representatives, subject to the execution of such power. And although the trustees might decline the trust, equity can always find a trustee, especially in cases of charity.

As a general principle, courts of equity have jurisdiction to enforce the performance of charitable trusts created within their jurisdiction, although the objects of the trust are in a foreign country.¹ But the trust for a foreign charitable purpose must not contravene the policy of the law where the trust is sought to be enforced.² It is further held that courts will not interfere to direct the *application* of the fund in a foreign country, especially where there is a competent jurisdiction for that purpose in that country.³

The extent of the powers of a trustee in the con-

¹ *Forbes v. Forbes*, 18 Beav., 552; *Att. Gen. v. Sturge*, 23 L. J. Ch., 495; *Thompson v. Swoope*, 24 Penn. St., 474.

² *De Garcia v. Lawson*, 4 Ves., 434; *Smart v. Prujean*, 6 Ves., 560; *Duke Char. Uses*, 466; 2 Jarm. Pow. Devis., 13.

³ *Emery v. Hill*, 1 Russ., 111; *P. of Edinburgh v. Auberry*, Ambl., 236; *Collyer v. Burnett*, Taml., 79; *Forbes v. Forbes*, 18 Beav., 522; *Att. Gen. v. Sturge*, 23 L. J. Ch., 495; *Minet v. Vulliamy*, 1 Russ., 113; *Att. Gen. v. Lepine*, 2 Sw., 181.

trol and management of charities, depends upon the terms of the instrument upon which the trust is founded ; and when they are invested with *general* discretionary powers of administration, the court will not interfere, except for abuse of the trust.¹ But, nevertheless, if it appear that they are conducting improperly, the court is bound to interfere,¹ Upon the principle that charities are highly favored by the court, they will exercise a more complete and searching jurisdiction for the supervision and control of trustees of charities than in other cases. Therefore, trustees in such cases, must be careful not to exceed the power conferred on them by the instrument of foundation ; or to travel out of the strict line of the trust. Should any questions arise from the wording of the trust, or from any change in the property, or alteration in the circumstances which seem not to be clearly defined or provided for by the founder, they should apply to the court for direction rather than incur the responsibility of acting upon their own judgment.²

There are certain principles connected with the duties and powers of trustees for charity which ought to be considered. And (1) they should never alienate the trust estate without the authority of the court. Such alienations, as a general rule, will

¹ Willis v. Childe, 13 Beav., 117, 454; Reg. v. D. School, 6 Q. B., 682; Wilkes' Charity, Macn. & G., 440; Att. Gen. v. May, 5 Cush., 351; Att. Gen. Wallace, 7 B. Monr. 611.

² Att. Gen. v. Christ Church, Jac., 474; Att. Gen. v. Earl of Mansfield, 2 Russ., 501; Att. Gen. v. Earl of Lonsdale, 1 Sim., 105; Att. Gen. v. Buller, Jac., 407; Att. Gen. v. Norwich, 16 Sim., 225.

be considered *per se* as a breach of trust. There are circumstances however which have been deemed a justification of such an act without seeking the sanction of the court, or at least where the court have sanctioned the act.¹ As it is a prime duty of the trustee to preserve the trust property, and act favorable to the trust interests, if he sell the trust property, he must be prepared to show that the transaction was beneficial to the charity; and in the absence of such proof, the sale will be treated as a breach of trust and be set aside.² With respect to the general power of trustees to grant leases of charity property, Lord Langdale, M. R., in the case of *Attorney General v. Kerr*,² remarked: "It is certainly a strong proposition to lay down that the trustees of a charity have the same powers which a prudent owner has with respect to his own property. There may, perhaps, be *dicta* which go almost to that extent, but I apprehend that much more is expected from trustees acting for a permanent charity, than can be expected from the ordinary prudence of a man in dealing between himself and other persons. A man acting for himself may indulge his own caprices, and consider what is convenient or agreeable to himself as well as what is strictly prudent. Trustees of a charity, within the limits of their authority, whatever that may be, should be

¹ *Att. Gen. v. Nethercoat*, 1 Harv., 400; *Att. Gen. v. Wallace*, 7 B. Monro, 611; *Brown v. Lutheran Church*, 23 Penn. St., 498; see remarks of Lord Langdale, M. R., 4 Beav., 458.

² *Att. Gen. v. Owen*, 10 Ves., 555; *Att. Gen. v. Kerr*, 2 Beav., 240; *Att. Gen. v. Brittingham*, 3 Beavan, 91; *Att. Gen. v. Brooke*, 18 Ves., 326; *Att. Gen. v. Pargeter*, 6 Beavan, 150.

guided by a desire to promote the lasting interests of the charity.”¹ So jealous are courts of the fidelity of trustees for charity, that they will seize upon any personal advantage the trustee may have secured to himself as an evidence of unfaithfulness and will act accordingly.² Where, by the terms of the trust, the particular charitable purposes are clearly defined in respect to such purposes, the trustee has no discretion; hence, in such cases, a deviation from those purposes would be deemed a breach of the trust.³ So, also, when a particular manner of executing the trust is pointed out, they must strictly adhere to it in their administration.⁴ Where the objects of a trust for charity are described in *general* terms, as a trust for the *poor* of a parish, the trustee must adopt the construction which has been applied by the court, to such general terms.⁵ Upon the same principles where the trust is for the support of a particular class of religious tenets, and the trustees divert the fund to support another class, the court will interfere to prevent such diversion, and require them to be appropriated to teaching the doctrines for which they were originally intended.⁶ In order to ascertain

¹ See preceding note.

² Att. Gen. v. Stamford, 2 Sw., 592; Att. Gen. v. Dixie, 13 Ves., 519, 534; Att. G. v. Clarendon, 17 Ves., 491, 500.

³ See Duke on Char. Us., 116; Att. Gen. v. Hurst, 2 Cox R., 354, 365; Corbyn v. French, 4 Ves., 419, 433.

⁴ Att. Gen. v. Griffith, 13 Ves., 565; Att. Gen. v. Rochester, 2 Sim., 34.

⁵ Att. Gen. v. Clark, Ambl., 422; Att. Gen. v. Wilkinson, 1 Beav., 370; Att. Gen. v. Hartley, 2 J. & W., 370; Att. Gen. v. Jackson, 2 Keen, 541.

⁶ Att. Gen. v. Pearson, 3 Mer., 353; Att. Gen. v. Shore, 7 Sim., 309; also 9 Cl. & F., 390; Att. Gen. v. Wilson, 16 Sim., 210; Gable v. Miller,

the doctrine for the support of which the trust was created, reference may be had to history, and to the prior and contemporaneous standard theological writers of the time.¹ The question of the duties and powers of trustees for charities, will be considered further under the particular head of their liabilities.

The proceedings to establish or direct charities, etc., may be had in chancery, either by original bill, or upon information by the Attorney General.² The mode of proceeding by commission under the statute of Elizabeth has been abandoned, and that of information by the Attorney General has been universally substituted in its stead.³ If the gift be such that it would not be a charity under the statute, an information in the name of the Attorney General will not lie,⁴ but, nevertheless, if it be such a charity as the court ought to sustain, they will sustain it, and establish the charity in such a manner as the law will permit.⁴

When the charity is under the supervision of local visitors, the jurisdiction of chancery does not obtain, because the founder has placed it under their

10 Paige, 647; *Miller v. Gable*, 2 Denio, 492; *Field v. Field*, 9 Wend., 394; *Kniskern v. Lutheran Churches*, 1 Sandf. Ch., 439; *Brown v. Summers*, 10 Law Jour. N. S. Chanc., 71; *Att. Gen. v. Pearson*, 3 Mer., 409.

¹ *Att. Gen. v. Shore*, 9 Cl. & F., 390; *Drummond v. Att'y Gen.*, 2 H. L. Cases, 837; *Miller v. Gable*, 2 Denio, 492; *Trustees v. Sturgeon*, 9 Barr., 322; see *Harper v. Straws*, 14 B. Monr., 48.

² *Story's Eq.*, 1163; *Com. Dig.*, ch. 2, note (1).

³ *Att. Gen. v. Hewer*, 2 Verm., 382; *Shelford*, 278; *Willard's Eq.*, 572.

⁴ *Att. Gen. v. Smart*, 1 Ves., 72; *Att. Gen. v. Jeanes*, 1 Atk., 355; *Att. Gen. v. Whitty*, 11 Ves., 241; *Att. Gen. v. Parker*, 1 Ves., 43; *S. C.*, 2 Atk., 576.

direction.¹ But the application of the revenues of a charity is a trust, the strict performance of which the court will require, notwithstanding the appointment and existence of a visitor.²

TRUSTS FOR THE BENEFIT OF CREDITORS.

Assignments for the benefit of creditors may be directly to the creditors themselves, or to a trustee or trustees, who take the property in trust for them. These assignments, when made in good faith, will be sustained, and the trustee will be vested with the legal interest necessary to enable him to perform the duties imposed upon him. In England it is held that the debtor is not bound by his assignment unless the creditors are in some way privy to it, or have assented thereto.³ Where there has been no understanding between the debtor and his creditors, or where the creditors have had no information on the subject, they hold that the assignment of the debtor is merely a *power*, which may be revoked by him at pleasure; and the creditors, although named

¹ Att. Gen. *v.* Rice, 3 Atk., 108; Att. Gen. *v.* Gov. H. School, 2 Ves., 552; Story's Eq., sec. 1163; Att. Gen. *v.* Lock, 3 Atk., 165; Att. Gen. *v.* Middleton, 2 Ves., 327; Att. Gen. *v.* Catharine Hall, Jac., 392; Att. Gen. *v.* Archbishop of York, 2 R. & M., 468.

² Att. Gen. *v.* Corporation of B., 2 Ves., 505; Att. Gen. *v.* Magdalen College, 11 Jur., 681; Att. Gen. *v.* Dixie, 13 Ves., 519; Whiston *v.* Dean Rochester, 7 Hare., 532; Att. Gen. *v.* Dean etc. Rochester, 20 Law J., 2 B., 467; Att. Gen. *v.* Earl of Clarendon, 17 Ves., 491; Att. Gen. *v.* Smythes, 1 Keen, 239; Att. Gen. *v.* Bro. Hospital, 17 Sim., 137; Sander-son *v.* White, 18 Pick., 332.

³ Walwyn *v.* Coutts, 3 Mer., 707; Shirley *v.* Ferrers, 1 Bro. C. C., 41; Smith *v.* Keating, 6 M., Gr. & S., 136; Garrard *v.* Ld. Lauderdale, 3 Sim., 1; Hamilton *v.* Houghton, 2 Bligh, 169.

in the deed or schedule, acquire no rights under it.¹ They treat the transaction, under such circumstances, as though the trustee was merely the agent of the debtor, and might be removed by him at will.² But if there exists any understanding or privity on the part of the creditors, even though the information be communicated to them by the trustee, the legal estate is immediately vested in the trustee, and the power of revocation is gone.³

In the United States the rule seems to be different. Where the assignment is to a trustee or trustees, in trust for the creditors generally, or for certain specified ones, and is made in good faith without conditions deemed injurious to the interests of the creditors, the legal estate at once is vested in the trustee, and the assent of the creditors is presumed, unless the contrary is proved.⁴ Assignments for the benefit of creditors are adjudged to be made upon a valuable consideration, and therefore binding upon the parties from the time of their execution.⁵

Upon the presumed assent of the creditors to the assignment of the debtor, where the assignment is made to trustees, the rule in the several states is quite uniform. Where the assignment is made in

¹ *Paige v. Broom*, 4 Russ., 6; *Acton v. Woodgate*, 2 M. & K., 492; *Garrard v. Landerdale*, 3 Sim., 1.

² *Acton v. Woodgate*, 2 M. & K., 492.

³ 2 M. & K., 495; see *Hinde v. Blake*, 3 Beav., 234; *Hill on Trustees*, 83, note 1; *Story's Eq.*, sec. 972, and note 3.

⁴ *Nicol v. Mumford*, 4 Johns. Ch. R., 522; *Brooks v. Marbury*, 11 Wheat., 78; *Halsey v. Whitney*, 4 Mason, 206; *Thompkins v. Wheeler*, 16 Pet., 118; *Cunningham v. Freeborn*, 11 Wend., 240.

⁵ 2 Kent's Com., 533; *Day v. Dunham*, 2 Johns. Ch. R., 188; *Russell v. Woodward*, 10 Pick., 413; *Story's Eq.*, sec. 1036, and authorities cited.

good faith, and is deemed to be beneficial to the creditors, in perhaps every state in the Union their assent will be presumed; that is, their assent is the presumption of law, until the contrary is proved.¹ But if the deed contains stipulations which are not beneficial, such as postpone the collection of their debts beyond the period of their maturity, or such as require some unfair advantage on the part of the debtor, the assent of the creditor will not be presumed.²

Where the assignment to the trustee names the creditors as parties to the assignment, and annexes conditions, the creditors must manifest their assent, according to the terms of the deed, before they can claim the benefits of it.³

If there are stipulations in the assignment that creditors shall release the debtor, or shall do anything which may not be for their benefit, their assent must be obtained before the assignment will be valid to divest the debtor of his title,⁴ and, consequently, the property will be subject to execution or attachment as the debtor's property, until such assent is given. Such stipulations do not invalidate the assignment;⁵ they only destroy the *presumption* of the

¹ Halsey v. Whitney, *ut supra*; Klapp's Assignees v. Shirk, 13 Penn. St., 589; Nichol v. Mumford, *ut supra*; Thompkins v. Wheeler, *ut supra*.

² Nelson v. Dunn, 15 Alab., 502; Evans v. Lamar, 21 Alab., 333; Fellows v. The Vicksburgh R. and B. Co., 6 Rob., 246; Elmes v. Southerland, 7 Alab., 262; Klapp's Assignees, *ut supra*.

³ Story's Eq., sec. 1036 (a); Garrard v. Lauderdale, 3 Sim., 1.

⁴ Story's Eq., sec. 1036, (a), (b).

⁵ Halsey v. Whitney, 4 Mason, 206; Pearpont v. Graham, 4 Wash. C. C. R., 232; Bradshear v. West, 7 Pet. R., 608; Story's Eq., sec. 1036; Sheldon v. Dodge, 4 Denio, 217; Wakeman v. Groner, 4 Paige R., 23; Austin v. Bell, 20 Johns. R., 442.

assent of the creditors, and make an *actual* assent necessary.

In case of voluntary assignments directly to the creditors themselves, their assent must be *actually* given before the assignment will be valid so as to transfer the property from the debtor to his creditors.¹ These assignments being in the nature of a contract between the debtor and those of his creditors who are made parties to it, cannot operate to bind either debtor or creditor; or to transfer the property to the creditors until their assent is actually given to the assignment according to its terms. Consequently, if the creditors do not become parties to the assignment, either by executing the deed on their part, when that is made necessary, or by otherwise *actually* assenting thereto, the relation of the debtor and his property to them undergoes no change.²

Where there is no provision in the deed of assignment making it necessary that all the creditors or any specified number of them shall execute the deed or assent to it to make it valid, the execution of it by one or more, or the assenting to it by a part of the creditors only, will be sufficient to divest the debtor of his title to the property, by making the instrument valid and operative.³

The assignment being in the nature of a contract

¹ Lawrence v. Davis, 3 McLean, 177; Nichol v. Mumford, 4 Johns. Ch., 522.

² Story's Eq., sec. 1036, (a); Simmonds v. Pallas, 2 Jones & Lat., 489; Lawrence v. Davis, *ut supra*; Drake v. Rodgers, 6 Mo., 317.

³ See Story, J., in Halsey v. Whitney, 4 Mass., 206; Hastings v. Baldwin, 17 Mass., 556.

between the debtor and his creditors, must be complete, and be fully acquiesced in by at least two parties before the property is transferred by it. If, therefore, there are conditions which are not agreed to, or if, from any cause, the contract is not complete, neither party is bound, and nothing passes between them. Thus in the case of *The Fall River Iron Works Co. v. Croade*,¹ where a debtor called on his creditor, and showed to him a sketch of a proposed assignment, and of the mode of applying the proceeds of his property; and this sketch, so far as regarded this creditor, was made a part of the deed executed by the debtor; yet in no other way assented to or executed by the creditor, it was held as against an attaching creditor, that the assent was not sufficient.¹

For a similar reason, where the assignment is made to a trustee for the benefit of creditors, the title will not vest in the trustee until he accepts the trust.² It follows, therefore, that the property of the debtor remains subject to execution until the acceptance of the trust by the trustee. But that acceptance may be presumed.

As the creditor may dispose of his property absolutely for the payment of his debts; and may pay one creditor in preference to another; so also may he assign his property to trustees for such purpose; and by the condition of the deed require the trustee

¹ 15 Pick., 11; see also *Crosby v. Hillyer*, 24 Wend., 280; *Jackson v. Phipps*, 12 Johns. R., 418.

² *Crosby v. Hillyer*, *ut supra*; *Willard's Eq.*, 465; *Jackson v. Bodle*, 20 John., 184.

to prefer certain of his creditors to others. It is well settled, that a debtor in failing circumstances, where there is no code of bankrupt or insolvent laws prohibiting it, may make an assignment of his property in trust, giving preference to one class of creditors over another.¹ In New York it is provided by statute,² that all deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust, for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person. The legislature have also provided for the appointment of assignees or trustees who may take the estates of the insolvent debtor and dispose of them for the benefit of the creditors;³ and the spirit and intent of those provisions are to secure to all the creditors their legal and just rights. And it is also provided by statute,⁴ that all conveyances made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, shall be void.

¹ 2 Kent's Com., 532; *Day v. Dunham*, 2 Johns. Ch. R., 188; *Russel v. Woodward*, 10 Pick., 413; *Winteringham v. Lafoy*, 7 Cowen, 735; *Hendricks v. Robinson*, 2 J. C. R., 283; *Goodrich v. Downs*, 6 Hill, 438; *Will. Eq.*, 466; *Story's Eq.*, sec. 1036; *Wheeler v. Sumner*, 4 Mason C. C. R., 183; *Halsey v. Whitney*, 4 Mason, 206; *Edrington v. Rogers*, 15 Texas, 188; *Nye v. Van Husan*, 6 Mich., 329; *Woods v. Zimmerman*, 27 Miss., 107.

² 2 R. S., 135, sec. 1, tit. of Fraudulent Conveyances and Contracts, etc.; see 6 Hill., 438, *ut supra*.

³ 2 R. S., 34, art. 7.

⁴ 2 R. S., 137, tit. 3, sec. 1, of Fraudulent Conveyances, etc.; *Kellogg v. Slawson*, 15 Barb., 56.

Therefore, courts, acting upon the spirit of these provisions, must look sharply into all assignments which tend to injure some creditors, by preferring others. Thus, if an insolvent debtor assign all his property in trust to pay certain *preferred* creditors, without making provision for the others, and also provides for a reconveyance of the residue to himself, the assignment is clearly fraudulent and void, and no estate vests in the trustee.¹ So when the deed of assignment has such conditions as may favor the debtor and injure the creditors, or at least, not be for their benefit, it will be adjudged to be void,² as requiring the creditor to discharge the debtor from all claims against him on receiving a dividend, &c. So where there is a stipulation of a release as a condition of obtaining a preference under the assignment.³ So if the assignment stipulates that the residuum of the property, after paying certain debts, shall be paid back to the debtor before all the creditors are satisfied:⁴ or where the assignment includes but a part of the property of the debtor, and yet he stipulates for a release from his creditor as a condition of receiving benefit.⁵ So also where there are stipulations that the debtor may retain possession and use the

¹ *Barney v. Griffin*, 2 Comstock, 365; 2 R. S., 135, sec. 1; but see *Dow v. Platver*, 16 N. Y. R., 562; *Mabbet v. White*, 2 Kern., 442; *Kellogg v. Slawson*, 15 Barb., 56.

² *Green v. Trieber*, 3 Md., 11; *Goodrich v. Downs*, 6 Hill, 441; *Nicholson v. Leavitt*, 2 Seld., 510; *Grover v. Wakeman*, 11 Wend., 187; *Litchfield v. White*, 3 Seld., 438.

³ *Stewart v. Spencer*, Curtis Ct. Ct. Rep., 157.

⁴ *Goddard v. Hapgood*, 25 Vt., (2 Dean) 351.

⁵ *Gadsden v. Carson*, 9 Rich's Eq., 252.

property assigned;¹ or where he is to be employed as the agent of the assignee for a compensation.² Preferences of creditors may be made by the debtor,³ but they must be made by *himself in the assignment*; he cannot delegate the power to his assignee; and the transaction must be free from the taint of fraud or self-interest.⁴ Under the statute which declares void all assignments made with intent to hinder, delay or defraud creditors, whenever an assignment requires or authorizes the performance or omission of any thing which tends to produce such a result, it will be deemed fraudulent and void:⁵ as where there is an assignment of all the assignor's property with authority to the assignees, to discharge their duties "whenever it should suit their pleasure and convenience."⁶ So also where the assignment contains a provision authorizing the assignees, in their discretion, to complete work begun, and to carry on the business for the purpose of using up materials.⁷

¹ *Montgomery's Ex'ors v. Kirksey*, 26 Alab., 172; see remarks of Chief Justice Chilton, in giving the opinion of the court; *Klapp's Assignees v. Shirk*, 13 Penn. St. Rep., 589; *Butler v. Stoddard*, 7 Paige, 163; *Connah v. Sedgwick*, 1 Barb., 210; *Deweese v. Adams*, 4 Edw., 21; *Lockhart v. Wyatt*, 10 Alab., 231; *Graham v. Lockhart*, 8 Alab., 9; *Brooks v. Wimmer*, 20 Mo., 503; *Nicholson v. Leviatt*, 4 Sandf., 252; *Mead v. Phillips*, 1 Sandf. Ch. Rep., 83.

² *Nicholson v. Leviatt*, 4 Sandf., 252; *Butler v. Stoddard*, 7 Paige, 163.

³ *Browning v. Hart*, 6 Barb., 91; *Brigham v. Tillinghast*, 15 Barb., 618.

⁴ *Strong v. Skinner*, 4 Barb., 559; *Austin v. Bell*, 20 John. R., 442; *Sheldon v. Dodge*, 4 Denio, 217; *Grover v. Wakeman*, *ut supra*; *Searing v. Brinkerhoff*, 5 John. Ch. R., 329; *Murry v. Judson*, 5 Seld., 73; *Plank v. Schermerhorn*, 3 Barb. Ch., 644; *Litchfield v. White*, 3 Seld., 438; *Wright v. Linn*, 16 Texas, 34.

⁵ *Sangstone v. Gaither*, 3 Md., 11.

⁶ *Woodburn v. Mosher*, 9 Barb., 255.

⁷ *Dunham v. Waterman*, 3 Smith, 9; see also *Hart v. Crane*, 7 Paige, 37.

So, also, if it authorize the assignee to sell on credit.¹

But when a construction may be given which will sustain the assignment rather than defeat it, such construction will be given; ² as where the direction is to convert the assigned property into money as soon as reasonably practical, with due regard to the interest of the parties concerned.³ But where the assignees are authorized to sell for other than money it vitiates the assignment: as where they are directed to "convert the property into money or other means."⁴

Whenever the assignment in trust to pay debts, includes real property, the purposes of the trust must be such as are authorized by the statute,⁵ which is "*to sell lands for the benefit of creditors.*" If therefore, the trust in such assignment be for any other purpose not enumerated in the statute, no title vests in the trustee.⁶

The spirit of the decisions in New York upon these questions appears in the remarks of Chancellor Walworth, quoted by Mr. Willard in his Treatise on

¹ *Nicholson v. Leavitt*, 2 Seld., 510; *Burdick v. Post*, 12 Barb., 168, aff'd 2 Seld., 522; *Porter v. Williams*, 5 Seld., 142; *D'Ivernois v. Leavitt*, 23 Barb., 63; *Barney v. Griffen*, 2 Comst., 365.

² *Kellogg v. Slauson*, 1 Kern., 302, aff'g 15 Barb., 56.

³ *Bellows v. Partridge*, 19 Barb., 176; see also *Whitney v. Krows*, 11 Barb., 198; *Nichols v. McEwen*, 21 Barb., 65; *Clark v. Fuller*, 21 Barb., 128.

⁴ *Brigham v. Tillinghast*, 3 Kern., 215.

⁵ 1 R. S., 728, sec. 55.

⁶ *Willard's Eq.*, 247; *Barnum v. Hempstead*, 7 Paige, 568; *Shedon v. Dodge*, 4 Denio, 217; *Boardman v. Holliday*, 10 Paige, 223; *Strong v. Skinner*, 4 Barb., 559; see *Darling v. Rogers*, 22 Wend., 483.

Equity Jurisdiction.¹ Chancellor Walworth held that an assignment for the benefit of creditors which attempted to appropriate a part of the assignor's property for the use of his wife, to satisfy an alleged claim in her favor, which she could not have recovered by any suit or proceeding in law or equity, was void as against creditors. The chancellor observes: "If the property of the assignor, at the time of the assignment, was not sufficient to pay all his other debts, and this alleged claim also, or so much of it as was attempted to be secured by this assignment, then the assignment was a fraud upon the creditors, inasmuch as it would deprive them of the power of ever obtaining payment of the whole of their debts.² On the contrary, if the defendant had ample property to pay all his debts, including the debt due to the complainant, then it was a fraud upon his creditors to assign all his property to an assignee, and to authorize such assignee to employ the proceeds thereof in defending suits which might be brought against the assignor by his creditors to recover their several debts.³ For it is equally fraudulent, under the statute, to make an assignment of property for the purpose of *delaying* creditors in the collection of their debts, as for the purpose of *defeating* them in their final collection.⁴ And this provision of the assignment could have been inserted for no other

¹ Willard's Eq., 247; Plank v. Schermerhorn, 3 Barb. Ch., 644; Green v. Frieber, 3 Md., 11.

² Hooper v. Tuckerman, 3 Sandf., 311.

³ Mead v. Phillips, 1 Sandf. Ch., 83; Sewall v. Russell, 2 Paige, 175.

⁴ Hooper v. Tuckerman, 3 Sandf., 311.

purpose than to enable the assignee to leave the property in the possession and under the control of the assignor, and thus to defend suits which might be brought against him to obtain possession of the assigned property, and retain the expense of such defence out of the proceeds of such property.”¹

Wherever the debtor includes in his assignment any provision which looks to his own personal advantage as against the interest of the creditors, or where he provides for a continuance of his own supervision over and control of the assigned property, inconsistent with the transfer of the absolute legal title to the assignee, it will raise a presumption of a fraudulent intent; and if there be a fraudulent intent on the part of the debtor, or if such provisions or reservations are contrary to the letter or spirit of statutory prohibitions, they will vitiate the assignment.² Thus, all requirements which are coercive of creditors, imposing conditions that are not equitable or just, before they shall be entitled to the benefits of the assignment, render the assignment void.³ Mr. Kent, in his Commentaries,⁴ remarking upon this subject, says: “It is admitted in some of the cases, that the debtor may indirectly exert

¹ *Mead v. Phillips*, 1 Sandf. Ch., 83; *Sewall v. Russell*, 2 Paige, 175.

² *Rathbun v. Platner*, 18 Barb., 272; *Wilson v. Forsyth*, 24 Barb., 105; *Webb v. Daggett*, 2 Barb., 9; *Hyslop v. Clark*, 14 Johns., 458; *Searing v. Brinkerhoff*, 5 John. Ch., 329; *Austin v. Bell*, 20 John., 452; *Wakeman v. Grover*, 11 Wend., 181; *Collomb v. Caldwell*, 16 N. Y., 484; *Armstrong v. Byrne*, 1 Edw., 79; *Lentilhom v. Moffat*, 1 Edw., 450; *Strong v. Skinner*, 4 Barb. S. C. R., 546.

³ *Berry v. Riley*, 2 Barb., 307; *Searing v. Brinkerhoff*, *ut supra*; *Austin v. Bell*, *ut supra*.

⁴ 2 Kent's Com., 534, and authorities cited by him.

a coercion over the creditors through the influence of hope and fear, by the insertion of a condition to the assignment, that the creditors shall not be entitled to their order of preference, unless within a given and reasonable time¹ they execute a release of their debts by becoming parties to the instrument of assignment containing such a release, or by the execution of a separate deed to that effect.² In *Jackson v. Lomas*,³ there was a proviso to the assignment, that in case any creditor should not execute the trust deed which contained, among other things, a release of the debts by a given day, he should not be entitled to the benefit of the trust deed, *and his share was to be paid back to the debtor*. It seems to have been assumed throughout that case, that such a provision would not affect the validity of the assignment. Whatever might have been the understanding in the case, such a conclusion is not well warranted by the language of many of the American cases, and a deed with such a reservation would, under them, be invalid. The debtor may deprive the creditor who refuses to accede to his terms, of his preference, and postpone him to all other creditors; but then he will be entitled to be paid out of

¹ Whart. Dig., title Debtor and Creditor, E; *Pearpont & Lord v. Graham*, 4 Wash. Cir. C. Rep., 232; *Halsey v. Whitney*, 4 Mas. Rep., 206. The reasonableness of the period for the debtor to come in will depend on circumstances.

² *The King v. Watson*, 3 Price Rep., 6; *Lippencot v. Barker*, 2 Binn. R., 174; *Chever v. Clark*, 7 Serg. & Rawl., 510; *Scott v. Morris*, ib., 123; *Wilson v. Knipley*, 10 S. & R., 439; *Halsey v. Whitney*, *ut supra*; *De Caters v. Le Ray De Chaumont*, 2 Paige Rep., 492; *Canal Bank v. Cox*, 6 Greenl. Rep., 395.

³ 4 T. Rep., 166.

the residue of the property, if there should be any, after all the other creditors who released and complied with the condition of the assignment, are satisfied. If the condition of the assignment be that the share which would otherwise belong to the creditor who should come in and accede to the terms and release, shall, on his refusal or default, be paid back to the debtor or placed at his disposal by the trustee, it is deemed to be oppressive and fraudulent, and destroys the validity of the assignment, at least against the dissenting creditors.”¹

It has often been held that a provision in the deed of assignment, that the residuum, after paying the preferred creditors, or those signing the deed, or executing a release of the debtor, were fraudulent and oppressive and destructive to the validity of the instrument as against all who are not parties or do not assent thereto.² If any part of the property be reserved to the debtor, or be to be re-assigned to him before payment of the entire claim of the creditors, the assignment is void.³ But when the debtor assigns his property for the benefit of all his creditors, and stipulates for release, and provides that the dividends of those

¹ *McAllister v. Marshall*, 6 Binn. R., 338; *Hyslop v. Clark*, 14 John. R., 458; *Seaving v. Brinkerhoff*, 5 J. C. R., 329; *Austin v. Bell*, 20 John. R., 442; *Borden v. Sumner*, 4 Pick., 265; *Ingraham v. Wheeler*, 6 Conn. R., 277; *Atkinson v. Jordan*, 5 Ham. O. R., 294; *Lentillon v. Moffat*, 1 Edw. Ch., 451; *Ames v. Blunt*, 5 Paige, 16, 18; *Graves v. Roy*, 13 La. Rep., 457.

² *Ramsdell v. Sigerson*, 2 Gilm. R., 78; *Conekling v. Carson*, 11 Ill. Rep., 503; *Goodrich v. Downes*, 6 Hill Rep., 438; *Leitch v. Hollister*, 4 Comst. R., 211; *Barney v. Griffin*, 4 Sandf., 311; *Ingraham v. Griggs*, 13 S. & M., 22.

³ *Green v. Trieber*, 3 Md., 11.

creditors who refuse to become parties to the assignment, shall be paid over to the assignor, is valid.¹ So also where a firm assigned their partnership property for the payment of the partnership debts, stipulating for the payment of the surplus to themselves, is valid.² An examination of all the authorities upon this subject leads to this conclusion: that the assignment, to be valid, and consequently to transfer the legal title to the assignee, must be for a lawful purpose, and made in good faith; and when so made and executed, the title to the property is vested in the assignee as trustee for the creditors, who are made the *cestui que trusts*. And as the validity of the assignment depends upon the *bona fide* intention of the assignor and the legality of his purpose, when either or both these are wanting, the assignment is void as to persons whose rights are intended to be prejudiced thereby.³

It has already been stated that the assignment by the debtor of his property to his creditors will not be valid and binding upon either, until there has been an acceptance of the assignment by the creditors.⁴ Where this acceptance is required, either by law, or the conditions of the assignment, it is not necessary that *all* the creditors accept the assignment or execute the deed to make the instrument operative, unless it is so conditioned. For as

¹ Heydock v. Stanhope, 1 Curtis Ct. Ct. Rep., 471.

² Hubbern v. Waterman, 33 Penn. St., 414.

³ Rathbun v. Platner, 18 Barb., 272; Wilson v. Forsyth, 24 Barb., 105.

⁴ Crosby v. Hillyer, 29 Wend., 280; Cunningham v. Freeborn, 1 Edw., 256; 3 Paige, 557; 11 Wend., 241.

soon as the assignment has been accepted, or the deed been executed by one or more of the creditors, the contract is complete, and the legal title of the property passes from the assignor to the assignees.¹ When the assignment is beneficial to the creditors and does not delay them in the collection of their debts, the assent of a single creditor will be sufficient, although others refuse.² And where an attorney holds the claim of one or more of the creditors for collection, his assent for and on behalf of his clients will be sufficient.³ As the validity of the assignment depends upon the expressed or presumed assent of the creditors, where it has been executed in good faith and for a legal purpose by the debtor, it becomes important to determine *when* and *how* that assent may be given. If the assignment require the signature of the creditors, before it shall be deemed operative, then such signatures will be necessary to transfer the estate from the debtor to the creditors.⁴ But if such signatures are not required by the terms of the instrument, then the verbal assent of the creditors will be sufficient.⁵ Or, their

¹ Halsey *v.* Whitney, 4 Mass., 206; Hastings *v.* Baldwin, 17 Mass., 556; North *v.* Turner, 9 Serg. & Raw., 244; De Forest *v.* Bacon, 2 Conn. R., 633; see 17 Mass., 454.

² Burrill on Assignments, 343, and quotes Rankin *v.* Lodor, 21 Alab., 380; Mauldin *v.* Armistead, 14 Alab., 702; Shearer *v.* Loftin, 26 Ind., 703.

³ Hatch *v.* Smith, 5 Mass., 53; Vernon *v.* Morton, 8 Dana, 247; Johnson *v.* Ogleby, 3 P. Wm., 277.

⁴ Story's Eq., sec. 1036, *a*; Garrard *v.* Ld. Landerdale, 3 Sim. Rep., 1; Simmonds *v.* Pallas, 2 Jones & Lat., 489; Jewett *v.* Woodward, 1 Edw., 195.

⁵ Story's Eq., sec. 1036, *a*; Brooks *v.* Marbury, 11 Wheat., 78.

assent may be manifested by seeking to avail themselves of the benefits of it.¹

As to the time *when* the assent should be given, if there is no time fixed upon by the assignment, then it is not necessary that the assent should be given, either at the time of the execution of the assignment by the debtor, or immediately thereafter. But the instrument will not be operative until such assent is given, because the contract is not complete until then.² If the instrument fix a time within which the assent of the creditors must be given to entitle themselves to the avails of the assignment, they must comply with such condition, or be excluded from the benefit of the trust.³ But in case of absent creditors who have no notice of the assignment it is different.⁴ They will be permitted to come in within a reasonable time after notice, and if the assignment be beneficial to them, their assent will be presumed.⁵

Where the assignment is to trustees and is for the advantage of the creditors, it has been held, that the assignment takes effect from the date of its execution, because, being for their benefit, their

¹ 2 Kent's Com., 533; *Bradshaw v. West*, 7 Pet. U. S. R., 608; *Cunningham v. Freeborn*, 1 Edw. Ch. Rep., 262; *Ellison v. Ellison*, 6 Ves., 656; *United States v. Bank of U. S.*, 8 Rob. (La.), 262, and 412.

² *Halsey v. Whitney*, 4 Mas., 206; *Lawrence v. Davis*, 3 McLean, 177; *Dunch v. Kent*, 1 Vern., 260, 319.

³ *Phoenix Bank v. Sullivan*, 9 Pick., 410; *De Caters v. Le Ray &c.*, 2 Paige, 490; *Jewett v. Woodward*, 1 Edw., 195.

⁴ *Story's Eq.*, sec. 1036, *a*; *Phoenix Bank v. Sullivan*, *ut supra*; *De Caters v. Le Ray De Chaumont*, 2 Paige, 490.

⁵ *Adams v. Blodgett*, 2 Wood. & M. R., 233; *North v. Turner*, 9 Serg. & R., 436; *Deforest v. Bacon*, 2 Conn., 633.

assent is presumed until the contrary is shown.¹ It is not necessary that all the trustees named in the deed assent thereto, unless the instrument expressly require it. The assent of one or more of them to the assignment, will vest the legal estate in those assenting, although the others should not assent thereto.²

It has already been stated that it is competent for debtors in failing circumstances, to make assignments preferring one creditor to another; and that such preference will not invalidate the assignment. Such is the general law where there are no bankrupt or other laws prohibiting such preferences.³ But in several of the States this preference is disallowed. In New Jersey, the statute requires that the assignment of an insolvent be for the equal benefit of all his creditors; therefore an assignment which creates a preference is invalid,⁴ although made

¹ *Marbury v. Brooks*, 7 Wheat. R., 556; also 11 id. 78; *Nicoll v. Mumford*, 4 J. C. R., 529; *Small v. Marwood*, 9 B. & Cres., 300; *Smith v. Wheeler*, 1 Vent., 128.

² *Nicoll v. Mumford*, 4 Johns. Ch., 529; *Neilson v. Blight*, 1 Johns. Cas., 205; *Moses v. Murgatroyd*, 1 John. Ch., 119; *Duke of Cumberland v. Coddington*, 3 J. C. R., 216; *Weston v. Barker*, 12 John. R., 276.

³ 2 Kent's Com., 532, and following authorities, there cited: *Pickstock v. Lyster*, 3 Maule & Selw., 371; *The King v. Watson*, 3 Pr. Exch. Rep., 6; *Wilt v. Franklin*, 1 Binn. Rep., 502; *Hendricks v. Robinson*, 2 John. Ch. R., 307, 308; *Stevens v. Bell*, 6 Mass., 339; *Nicoll v. Mumford*, 4 John. Ch. R., 529; *Brown v. Minturn*, 2 Gall. Rep., 557; *Moor v. Collins*, 3 Dev. N. C. R., 126; *Moffat v. McDowal*, 1 McCord Ch. R., 434; *Buffum v. Green*, 5 N. H. R., 71; *Haven v. Richardson*, 5 N. H. R., 113; *Marbury v. Brooks*, 7 Wheat., 556; *Brashear v. West*, 7 Pet. U. S. Rep., 608; *Sutherland, J.*, in *Grover v. Wakeman*, 11 Wend., 194; *State of Maryland v. Bank of M'd.*, 6 Gill & J., 205; *Marshall v. Hutchinson*, 1 B. Monr., 305.

⁴ *Elmer's Dig.*, p. 16; *Varnum v. Camp*, 1 Green's N. J. R., 326; *Garr v. Hill*, 1 Stockt. R., 210; *Brown v. Holcomb*, ib., 297; *Holcomb v. Bridge Co.*, ib., 457.

in New York where it would be good, yet to operate on property in New Jersey.¹ So also in Georgia, by statute,² all assignments and transfers of property by insolvent debtors giving preference, are declared fraudulent and void.²

The insolvent act of Massachusetts,³ establishes the principle that when the debtor is unable to pay his debts, his property is to be equally divided among his creditors; and if the insolvent has not been guilty of fraud or gross misconduct, he is to be discharged from liability upon surrendering all his property for the benefit of his creditors. In Ohio, the statute⁴ prohibits assignments in trust, in contemplation of insolvency, with the design of preferring one creditor to another, and requires that they be made to enure to the benefit of all *pro rata*. In Connecticut, by statute,⁵ all assignments of lands, chattels or choses in action, made in view of insolvency, to any person in trust for creditors, must be made in writing for the benefit of all the creditors in proportion to their claims, and be lodged in the probate office of the district for record, or they will be void as to creditors.⁵

It has already been stated that a debtor in failing circumstances, and where there are no bankrupt or other special laws prohibiting it, may make a valid assignment of his property, real and personal, for the benefit of his creditors generally, or for a select

¹ Varnum v. Camp, *ut supra*.

² Du., 19, 1818; Prince Dig., 164; Brown v. Lee, 7 Geo. R., 267.

³ 1838, chap. 163.

⁴ 1838.

⁵ 1828; see also St. of 1838, p. 300.

or preferred number or class of them, provided his intentions are honest, and the purposes of the assignment legal. But an assignment for the benefit of creditors, though fraudulent in law or in fact, is valid and binding as between the assignor and assignee, and such creditors as choose to accept its terms or take advantage of its provisions.¹ So also a creditor who brings a trustee process against an assignee under a void assignment, ratifies his legal disposition of the property under the assignment, and consequently he cannot compel the assignee to account for property for which other creditors may hold him accountable or take from him.² The next question arising is, when does an assignment thus made take effect?

1. When the assignment is to a trustee for the benefit of the creditors and it contains no conditions or terms which would be deemed prejudicial to the creditors—such as conditions of release or discharge of the debtor, or the postponement of the collection of their debts beyond the period of their maturity and the like, and the trustee accepts the deed and trust, the assignment takes effect on delivery. For the trustee accepting, and the assignment being for the benefit of the creditors, their assent is presumed, and the contract is complete.³

¹ *Ames v. Blunt*, 5 Paige, 13; *Mills v. Argall*, 6 Paige, 577; *Seaman v. Stoughton*, 3 Barb. Ch., 344; see also *Russell v. Lasher*, 4 Barb., 232; *Ontario B'k v. Root*, 3 Paige, 478; *Olmstead v. Herrick*, 1 E. D. Smith, 310.

² *Bishop v. Hart*, 28 Vt., 71; *Merrill v. Englesby*, 28 Vt., 150.

³ *Hempstead v. Johnson*, 18 Ark., 123; *Marbury v. Brooks*, 7 Wheat. R., 556; also 11 do., 78; *Nicoll v. Mumford*, 4 J. C. R., 529; *Small v. Marwood*, 9 B. & Cres., 300; *Reed v. Robinson*, 6 W. & S., 329; *Clapp's Assignees v. Shirk*, 13 Penn. St., 589.

2. When the assignment is as above stated, but the trustee is not prepared to accept the trust without time to consider, the assignment will not take effect until the trustee signifies his acceptance.¹ But when the trustee is not present, his assent may be presumed for the purpose of giving effect to the deed.² Or, if the trustee accept the deed without signifying his assent at the time, but afterward assent, the deed will take effect from the delivery. Also when the assignment was in the form of a letter assigning personal property to an absent creditor and sent to him by mail, the assignment was held to take effect from its date.³

3. When the assignment is directly to the creditors themselves and conditioned upon their acceptance, it will take effect at the time of acceptance according to its terms. It may be stated as a general rule, that when the assignment has been made in good faith by one party and accepted according to its terms by another party whose acceptance is contemplated in the instrument, the assignment

¹ *Crosby v. Hillyer*, 24 Wend., 280; *Lawrence v. Davis*, 3 McLean, 177; *Pierson v. Manning*, 2 Mich., 446; *Cunningham v. Freeborn*, 11 Wend., 240.

² *Nicoll v. Mumford*, 4 J. C. R., 522; *Galt v. Dibrell*, 10 Yerg., 146; 1 Am. Leading Cases, 96; *Brevard v. Neely*, 2 Sneed, 164, etc; *Brown v. Minturn*, 2 Gall. R., 557; *Smith v. Wheeler*, 1 Vent., 128; *Burrill on Assignments*, quotes the following, p. 348: *Skepwith's Executors v. Cunningham*, 8 Leigh, 271; *Wilt v. Franklin*, 1 Pinn., 502; *McKinney v. Rhodes*, 5 Watts, 343; *Read v. Robinson*, 6 Wat. & Serg., 329; and see *Moore v. Collins*, 3 Dev., 126; *Ward v. Lewis*, 4 Pick., 518; *Merrills v. Swift*, 18 Conn., 257; 1 Amer. Lead. Cas., 96.

³ *Dargan v. Richardson*, 1 Cheves Law, 197; *Shubar v. Windings*, ib., 218.

takes effect, and the legal title to the property is transferred from the assignor to the assignee.¹

Upon general principles, it would seem that where the assignment is to trustees and they refuse to accept the trust, that no title passes from the debtor, because, until there is an acceptance, either express or implied, the property in the hands of the debtor is subject to execution or attachment,² and this view of the case was presented by Bell, J., in the case of *Seal v. Duffy*.² But it is nevertheless held, that although the acceptance of the assignment is necessary to constitute the assignee trustee for the creditors, yet the assignment shall not fail for want of such acceptance. If made for the benefit of creditors, the assent of the trustee is not essential to its validity, and a court of equity on behalf of the creditors, will enforce the execution of the trust.³

In the case of *King v. Donnelly*⁴ the Chancellor held that if A. be named as a trustee of an express trust of an undivided interest in land, and he refuse to act, the legal title is nevertheless in him, and if a sale be necessary, the court may, by decree, appoint a trustee to execute the trust, or direct an officer of the court to execute it. The Chancellor also held that had an appointment been necessary in

¹ *Klapps's Assignees v. Shirk*, 13 Penn. St. Rep., 589; *Read v. Robinson*, 6 Wat. & Serg., 329; *Brooks v. Marbury*, 11 Wheat., 78; see *Crosby v. Hillyer*, 24 Wend., 280.

² 4 Barr., 274; see also *Webb v. Dean*, 2 Penn. St., 29.

³ *Field v. Arrowsmith*, 3 Humph., 442; *Brevard v. Neely*, 2 Sneed, 164 and 171; *Burrill on Assignments*, 307; *King v. Donnelly*, 5 Paige, 46; *Dawson v. Dawson*, *Rice's Ch.*, 243; *Harris v. Rucker*, 13 B. Monroe, 564.

⁴ 5 Paige, 46.

that case it would have been within the spirit of the statute providing for the appointment of trustees in case of the death of a surviving trustee, &c. The common law principle upon this subject is, where the person or persons appointed trustee refuse to accept the office, so that there is no one to receive the legal estate, no estate passes: but the parties are in the same relation to the trust estate as though no trustee had been named,¹ and if the appointment were by will, the legal estate would vest in the heirs of the deviser;² and this could not be unless the legal estate were deemed to be in him at the time of his death.³

In assignments for the benefit of creditors, where they are made in good faith, and for lawful purposes, a trust may arise for the assignor. The residue which may remain in the hands of the trustee after paying all the debts, he will hold in trust for the debtor, whether it be so stipulated in the deed of assignment or not.⁴ But if the assignment be of all

¹ *Townson v. Tickel*, 3 B. & Ald., 31; *Hawkins v. Kemp*, 3 East, 410; *Smith v. Wheeler*, 1 Ventr., 128.

² *Stacey v. Elph*, 1 M. & K., 195.

³ See remarks and authorities post, on Disclaimer; and for American authorities see *Webb v. Dean*, 21 Penn. St., 29; *Brevard v. Neely*, 2 Sneys, 164; *Reynolds v. Bank of Va.*, 6 Gratt., 174; *Field v. Arrow-smith*, 3 Humph., 442; *Dawson v. Dawson*, Rice's Ch., 243; *King v. Donnelly*, 5 Paige, 46; *Brunner v. Storm*, 1 Sandf. Ch., 357; *Smith v. Schackelford*, 9 Dana, 452; *School v. Fisher*, 30 Maine, 524; *Taylor v. Galloway*, 1 Ham. (O.), 232; *Jones v. Maffet*, 5 Serg. & Raw., 523; *Christian v. Yancey*, 2 P. & H. (Va.), 240; *Brewster v. Striker*, 1 E. D. Smith, 321; *Bisco v. Royston*, 18 Ark., 508; *Nicols v. Mumford*, 4 Johns. Ch., 529; *Brooks v. Marbury*, 11 Wheaton, 97; *North v. Turner*, 9 Serg. & Raw., 244.

⁴ *Hall v. Denison*, 17 Verm., 311; *Rahm v. McElrath*, 6 Watts, 151; *Winteringham v. Lafoy*, 7 Cow., 735; *Burgin v. Burgin*, 1 Ired. Law, 453; *Van Rossum v. Walker*, 11 Barb. S. C., 237; *Curtis v. Leavitt*, 15 N.Y., 120.

the debtor's property in trust for only a part of the creditors, making no provision for the others, the surplus thus undisposed of may render the assignment void as to the creditors unprovided for; because that surplus, if allowed to stand, would result as a trust to the debtor.¹ If it appear upon the face of the deed that the debtor contemplated such surplus, as, by providing that the surplus, after paying the preferred debts, shall be re-assigned or paid back to the debtor, such assignment will be invalid.² The principle underlying these cases is, that the debtor shall act in good faith, and in no way, directly or indirectly, seek to benefit himself at the possible expense of his creditor or creditors by his assignment; neither shall he expressly or by necessary implication seek to hinder or delay them in the collection of their debts.

In England, at the death of an individual, his personal estate is vested by law in his personal representatives as a trust fund for the payment of his debts, and the testator is not allowed to create a special trust of his personal estate for that purpose so as to withdraw it from the administration of his executors.³ At common law the real estate of the testator was not liable for the payment of simple

¹ *Dana v. Lull*, 17 Verm., 390; *Pierson v. Manning*, 2 Mich., 445; but see 28 Verm., 150.

² *Lansing v. Woodworth*, 1 Sandf. Ch., 43; *Goddard v. Hapgood*, 25 Verm., 351; *Montgomery's Ex'rs. v. Kirksey*, 26 Alab., 172; *Green v. Trieber*, 3 Md., 11; see also *Doremus v. Lewis*, 8 Barb. S. C., 124; *Hooper v. Tuckerman*, 3 Sandf. S. C., 311; *Phippen v. Durham*, 8 Gratt., 457.

³ *Hill on Trustees*, 344, cites *Jones v. Scott*, 1 R. & M., 255; *Freaker v. Craneheld*, 4 M. & Cr., 499; *Evans v. Tweedy*, 1 Beav., 55.

contract debts unless by his will he made it so liable. But this rule is now done away by recent statutes,¹ and real estate is now chargeable with the payment of debts in case of deficiency of personal estate.² The general rule, both of the English and American law is, that the personal estate is the *primary* fund, for the discharge of the debts, and is to be first applied and exhausted, before the real estate is liable unless the testator by his will shall otherwise direct.³

The order of marshalling assets in equity towards the payment of debts, is thus:

1. The general personal estate;
2. Estates specially devised for the payment of debts;
3. Estates descended;
4. Estates devised, though generally charged with the payment; and it requires express words, or the manifest intent of a testator to disturb this order.⁴

¹ 3 and 4 Will. IV., chap. 104; 3 Black. Com., 430; Co. Litt., 209 (a).

² 2 Jarm. Pow. on Dev., 644, etc.; 6 Cruise's Dig., tit. 31, chap. 16, sec. 7, etc.; *Moores v. Whittle*, 22 Law J. Ch., 207; *Ball v. Harris*, 4 M. & Cr., 269; *Bodwler v. Smith*, Prec. Ch., 264.

³ 4 Kent's Com., 421; *Howel v. Price*, 1 Pr. Wm., 291; *King v. King*, 3 Pr. Wm., 358; 3 Johns. Ch. R., 357; 9 S. & R., 73; *Garnett v. Macon*, 6 Call., 308; *McKay v. Green*, 3 Johns. Ch., 56; *Smith v. Wyckoff*, 11 Paige, 49; *Hawley v. James*, 5 Paige, 318; *Henry v. Graham*, 9 Rich. Eq., 100; *Lloyd v. Lloyd*, 10 Rich. Eq., 469; *Whitehead v. Gibbons*, 2 Stockt., 230.

⁴ 4 Kent's Com., 421, and cites *Stephenson v. Heathcote*, 1 Edw. Rep., 38; *Lord Inchiquin v. French*, 1 Cox, 1; *Webb v. Jones*, 1 Cox, 245; *Bootle v. Blundell*, 1 Meriv. Rep., 193; *Barnewell v. Lord Cawdor*, 3 Mad. Rep., 453; *Watson v. Brickwood*, 9 Ves., 447; *Livingston v. Newkirk*, 3 Johns. Ch. Rep., 312; *Livingston v. Livingston*, Ib., 148; *Stroud v. Barnett*, 3 Dana Ken. Rep., 394; *Warley v. Warley*, Bailey's Eq. Rep., 397; see also *Gould v. Winthrop*, 5 R. I., 319; *Hanna's App.*, 31 Penn. St. Rep., 53; *Powers v. Jackson*, 13 Md., 443; *Whitehead v. Gibbons*, 2 Stockt., 230; *Shaw v. McBride*, 3 Jones Eq., 173.

A distinction is to be observed between a mortgage created by the testator on the estate devised, for a debt originally contracted by him, and one charged upon the estate when it came to him as the debt of another. If the mortgage is for a debt contracted by the testator or intestate, the personal estate will be held as a primary fund for its payment.¹ But if the mortgage was created by another, and was an original charge upon the estate, the personal estate will not be the primary fund unless made so by the testator.² This distinction prevails in all the States except New York, where it is abolished by statute, which provides, that whenever any real estate, subject to a mortgage executed by any ancestor or testator, shall descend to an heir, or pass to a devisee, such heir or devisee shall satisfy and discharge such mortgage, out of his own property, without resorting to the executor or administrator of his ancestor unless there be an express direction in the will of such testator, that such mortgage be otherwise paid;³ consequently the decisions upon this point in New York are not in harmony with those of other States.³

¹ *Gould v. Winthrop*, 5 R. I., 319; 4 Kent's Com., 421; *Garnet v. Macon*, 6 Call., 308; *Hoes v. Van Hoesen*, 1 Coms. R., 120; *Kelsey v. Western*, 2 Comst. R., 500; *Mitchel v. Mitchel*, 3 Md. Ch., 73; *Woods v. Huntingford*, 3 Ves., 128; *Pockley v. Pockley*, 1 Vern., 36.

² *Cumberland v. Codrington*, 3 John. Ch., 229; *Gould v. Winthrop*, 5 R. I., 319; *Hoff's App.*, 24 Penn. St., 200; *Dunlap v. Dunlap*, 4 Desau., 305; *McDowell v. Lawless*, 6 B. Monr., 141.

³ 2 Rev. St., 1846, p. 35, sec. 4; *Mollan v. Griffeth*, 3 Paige, 402; *Halsey v. Reed*, 9 Paige, 446; *Johnson v. Corbett*, 11 Paige, 265; *House v. House*, 10 Paige, 153; *Taylor v. Wendel*, 4 Bradf., 324; *Waldron v. Waldron*, 4 Ib., 114.

It has already been stated that, as a general rule, the personal estate is the primary fund for the discharge of debts. This is the rule in cases of intestacy, and under a will, where the testator does not manifest a different intention. But it is well settled that the testator can change the order of administration, and, if he desire, make his real estate the primary fund for the payment of debts or legacies;¹ or he can, by so directing in the will, convert his real into personal estate, and make it a common fund for such purposes;² or he may exonerate the personal estate altogether; and, for determining what was his intention in the premises, all parts of the will are to be considered.³ This gives rise to constructions by which the intention of the testator is to be ascertained. And, although it is the general doctrine of the courts that the intention of the testator to exonerate the personal estate from the payment of his debts, and to charge the same upon the realty, may be found by implication from the different parts and provisions of the will, yet it is seldom safe for one entrusted with the execution

¹ Hill on Trustees, 353; *Whitehead v. Gibbons*, 2 Stoekt., 230; *Loomis Appl.*, 29 Penn. St., 237.

² *Lorillard v. Coster*, 5 Paige, 172; *Hawley v. James*, 5 Paige, 318; *Gott v. Cook*, 7 Paige, 521; *Savage v. Burnham*, 3 Smith, 561; *Bramhall v. Ferris*, 4 Kern., 41; *Elliott v. Carter*, 9 Gratt., 541; *Cryder's Appl.*, 11 Penn. St. Rep., 72; *Loomis's Appl.*, 10 Barr., 387; *Ford v. Gaithur*, 2 Rich. Eq., 270; *Simmons v. Rose*, 20 Jur., 73.

³ *Gittens v. Steele*, 1 Sw., 28; *Marsh v. Marsh*, 10 B. Monr., 363; *Ruston v. Ruston*, 2 Dall., 243; *Jackson v. Sill*, 11 Johns., 201; *Bradhurst v. Bradhurst*, 1 Paige, 331; *Covenhoven v. Shuler*, 2 Paige, 122; *Rathbone v. Dyckman*, 3 Paige, 9; *Roberts v. Wortham*, 2 Dev. Eq., 173; *Plenty v. West*, 17 Jur., 9; *Hoes v. Van Hoesen*, 1 Coms., 122; *McFait's Appl.*, 8 Barr., 290.

of the will to act upon such implied intention without first consulting the court and taking its direction. Because the court will not presume the testator intended to disturb that order which the law deems just, unless the several provisions of the will are such as clearly and necessarily to raise the implication.¹ Therefore it has been held that where debts and legacies are charged on the real and personal estate, as where they are made a common fund for the payment of debts, etc., the personal estate is still to be taken as the primary fund.² The fact that the testator has charged his real and personal estate with the payment of debts, legacies, etc., furnishes no evidence that he intended to charge his realty unnecessarily; and hence, where he does not clearly signify an intention to convert the realty into personalty in the first instance, such a charge will be deemed to be in aid of the personal estate.³ So where there are legacies to be paid, and the per-

¹ *Brummel v. Prothero*, 3 Ves., 110; *Stapleton v. Stapleton*, 3 Ball & B., 523; *Milnes v. Slater*, 8 Ves., 305; *Rapalye v. Rapalye*, 27 Barb., 610; *Hanna's Appl.*, 31 Penn. St. Rep., 53; *Power v. Jenkins*, 13 Md., 443; *Henry v. Graham*, 9 Rich's Eq., 469; *Whitehead v. Gibbons*, 2 Stockt., 230.

² *Tench v. Cheese*, 24 L. J. Ch., 717; *Simmons v. Ross*, 20 Jur., 73; *Robinson v. Governors*, 10 Hare, 19; *Lupton v. Lupton*, 2 Johns. Ch., 614; *Dodge v. Manning*, 11 Paige, 334; *McKay v. Green*, 3 Johns. Ch., 56; *Hoes v. Van Hoesen*, 1 Coms., 120; *Kelsey v. Western*, 2 Coms., 500; *McLachlan v. McLachlan*, 9 Paige, 534; *Gould v. Winthrop*, 5 R. I., 319; *Adams v. Brackett*, 5 Metc., 280; *Hassenclever v. Tucker*, 2 Binn., 525.

³ *Boughton v. Boughton*, 1 House Lds. Cas., 406; *Field v. Lister*, 3 De G. Macn. & G., 857; *Tench v. Cheese*, 20 Fur., 717. But see *Robinson v. Governors*, 10 Hare, 19; and remarks of L. J. Knight Bruce, in *Tench v. Cheese*; *Tatlock v. Jenkins*, 1 Kay, 654; *Dodge v. Manning*, 11 Paige, 344; *Kelsey v. Western*, 2 Coms., 500; *Tracy v. Tracy*, 15 Barb., 503; see *Elliott v. Carter*, 9 Gratt., 541; *Dugan v. Hollins*, 4 Md. Ch. Decis., 139.

sonal estate is not sufficient to pay the debts and legacies, it frequently becomes an important consideration whether the legacies are to abate, rather than charge the realty. This question cannot arise where both debts and legacies are made a charge upon the real and personal estate. But where, from the language of the testator or the provisions of the will, there arises doubt as to his intention, strict reference must then be had to the order of marshalling the assets, as established by law.

It is a settled rule of law that a pecuniary or general legacy is not a charge upon the realty, unless the testator has expressly, or by necessary implication, manifested such an intention.¹ But where several legacies are given, and there is no express provision made for their payment, but a general residuary disposition is made of the whole estate, blending the realty and personalty together in a common fund, the real estate will be charged with the payment of legacies as well as debts;² because

¹ *Ripple v. Ripple*, 1 Raw., 386; *Stevens v. Gregg*, 10 G. & J., 143; *Lupton v. Lupton*, 2 Johns. Ch. Rep., 618; *Harris v. Fly*, 7 Paige, 421; *Gridley v. Andrews*, 8 Conn., 1; *Paxson v. Potts*, 2 Green's Ch., 313; *Wright's Appl.*, 12 Penn. St. Rep., 258; *Brandt's Appl.*, 8 Watts, 198; *Hoes v. Van Hoesen*, 1 Coms., 120. See *Hanna's Appl.*, 31 Penn. St. Rep., 53; *Shaw v. McBride*, 3 Jones's Eq., 173; *Sims v. Sims*, 2 Stockt., 158; *Whitehead v. Gibbons*, 2 Stockt., 230; *in re McCracken's Est.*, 29 Penn. St. Rep., 426; see *Hallowell's Est.*, 23 Penn. St. Rep., 223.

² *Mirchouse v. Scaife*, 2 M. & Cr., 696; *Bench v. Biles*, 4 Mad. Rep., 187; *Hassel v. Hassel*, 2 Dick., 526; *Cole v. Turner*, 4 Russ., 376; *Brudenell v. Boughton*, 2 Atk., 268; *Simmons v. Rose*, 39 Eng. L. and E. Rep. 89; *Lewis v. Darling*, 16 How. U. S. Rep., 10; *Downman v. Rust*, 6 Rand., 587; *Adams v. Bracket*, 5 Mete., 280; *Nichols v. Postlethwait*, 2 Dall., 131; *Gridley v. Andrews*, 8 Conn., 1; *Von Winkle v. Van Houten*, 2 Green, Ch., 172; *Carter v. Balfour*, 19 Alab., 815; *Buckley v. Buckley*, 11 Barb.,

the "residue" necessarily implies all that remains after satisfying previous gifts. But where there are specific devises of real estate previously made, it cannot be inferred that the testator intended such specific devise should blend and become a part of the common fund.¹ But whether the legacies are or are not to be a charge on the real estate is always one of intention, to be gathered from the will.²

Where there is any uncertainty whether the legacies are intended to be a charge on the real estate, the trustee or executor should not act without the direction of the court; because, a general legacy not being a charge on the realty, unless so provided in the will, if the executor pay it out of the personalty, and thereby render the personal estate insufficient to pay the debts, he will be liable.³

The personal estate being, *prima facie*, the primary fund for the payment of debts and legacies, before the contrary can be found to be the intention of the testator, such presumption must be clearly and unequivocally rebutted.⁴ And when the real

43; *Tracy v. Tracy*, 15 Barb., 503; [see *O'Brien v. Mooney*, 5 Duer. 51;] *Dodge v. Manning*, 11 Paige, 334; *Hoes v. Van Hoesen*, 1 Coms., 120; *Kelsey v. Western*, 2 Coms., 500; *Lloyd v. Lloyd*, 10 Rich. Eq., 469; *McHardy v. McHardy*, 7 Flor., 301; [see *Reynolds v. Reynolds*, 16 N. Y., 257;] *Rafferty v. Clark*, 1 Brad., 473; *Clyde v. Simpson*, 4 Ohio, (N.S.) 445.

¹ *Paxson v. Potts' Adm'rs*, 2 Green, Ch., 320; but see *Francis v. Clemon*, 1 Kay, 435.

² *Miles v. Leigh*, 1 Atk., 574; *Jones v. Selby*, Prec. in Ch., 288; *Minor v. Weeksteed*, 3 Bro. C. C., 627.

³ See *Murdock's App.*, 31 Penn. St. Rep., 47; *Hanna's App.*, *Ib.*, 53; *Sims v. Sims*, 2 Stockt., 158; *Loomis' App.*, 29 Penn. St. Rep., 237; *Derby v. Derby*, 4 R. I., 414; *Dugan v. Hollins*, 11 Md., 41.

⁴ As to what has been deemed sufficient to rebut such presumption, see *Jones v. Williams*, 8 Jur., 373; *Aubrey v. Middleton*, 2 Eq. Ca. Abr., 497; *Henwell v. Whitaker*, 3 Russ., 343; *Dover v. Gregory*, 10 Sims., 393.

estate is charged in aid of the personal estate, the personalty will continue to be the *primary fund*; and so a devise by which the debts are made a charge upon the real estate generally, will be deemed to be only in aid of the personalty.¹

So averse are the courts to reversing the order of marshalling assets for the payment of debts and legacies that they will seldom do it where there is not an express direction in the will, or an implication as certain and unequivocal as an express requirement. And wherever the expressions are such that they deem such a construction warranted, the debts are usually held to be paid *ratably* out of the real and personal estate. And especially where the real and personal estates are, by the terms of the will, converted into a common fund in trust for the payment of debts, they contribute *ratably* for such purpose.² These questions become important to the creditor in determining where he is to look for the trust out of which his claims are to be satisfied. This question will be more fully discussed when the powers and duties of trustees are considered.

¹ Hartley v. Hurle, 5 Ves., 540; Walker v. Hardwick, 1 M. & K., 396; Samwell v. Wake, 1 B. C. C., 144; Keysey's Case, 9 S. & R., 72; Kelsey v. Western, 2 Coms., 500; Hancock v. Minott, 8 Pick., 29.

² Simmons v. Rose, 20 Jur., 73; Adams v. Bracket, 5 Metc., 282; Cryder's Appl., 11 Penn. St. Rep., 72; Loomis' Appl., 10 Barr., 387; Ford v. Gaither, 2 Rich. Eq., 270; Elliott v. Carter, 9 Gratt, 541; Moses v. Murgatroud, 1 Johns. Ch. Rep., 119; Benson v. Le Roy, 4 Johns. Ch., 651.

TRUSTS FOR THE PAYMENT OF LEGACIES.

A trust is raised for the benefit of legatees when a testator has charged his estate with the payment of legacies and there is a sufficiency for that purpose after the payment of the debts of the estate. This sufficiency is necessary to raise the trust absolutely, the whole estate being charged, first, with the duty of discharging those obligations the testator is under to his creditors.¹

The entire estate of the testator, real and personal, in the hands of his executors and devisees, is a trust fund, if need be, for the payment of all legal demands and liabilities—not merely personal—existing against the testator at the time of his death, as well those which are due as those to become due. And when the testator has not himself determined the order and mode of payment the law determines it. The assets are marshalled thus for the payment of debts:²

1. The general personal estate.
2. Estates especially devised for the payment of debts and for that purpose only.
3. Estates descended.
4. Estates specifically devised though generally charged with the payment of debts.

¹ 4 Kent's Com., 421; *Watkins v. Holman*, 16 Peter's Rep., 25; *Wilson v. Wilson*, 13 Barb., 252; *Stroud v. Barnett*, 3 Dana Rep., 394.

² *Livingston v. Newkirk*, 3 Johns. Ch. Rep., 312; *Hoes v. Van Hoesen*, 1 Coms., 121; *McKay v. Green*, 3 Johns. Ch. Rep., 56; *Lupton v. Lupton*, 2 Johns. Ch. Rep., 614; *Stuart v. Kessam*, 11 Barb., 271; *Fisher v. Fisher*, 1 Brad., 335; *Gould v. Winthrop*, 5 R. 1., 319; *Barnwell v. Threadgill*, 3 Jones's Eq., 50; *Greenlee v. McDowell*, 3 Jones's Eq., 325.

Legacies are to be considered in the order in which they are liable to abate or cease to be a charge upon the estate of the testator by reason of the insufficiency of the estate to pay the debts, etc.

In the absence of an intention on the part of the testator to make his legacies a charge upon the realty, they are to be paid only out of the personal estate;¹ and in case of insufficiency of the personal estate to pay the debts, the legacies will abate;² and where there is a sufficiency to pay the debts, but not to pay the legacies, the *residuary legacies* will be the first to abate; for a residuary legacy is one which is to take effect after satisfying all preceding gifts.³ But even in cases of residuary legacies, there are instances where it is deemed to be contrary to the intention of the testator that they should abate. In the case of *Dyose v. Dyose*,⁴ Lord Cowper was of the opinion that the residuary bequest, although there was a deficiency because of waste committed, ought not to abate. The case was this. The testator was possessed of £20,000, consisting of East India stock, bank stock, and money in the funds; and by his will he gave to his two younger sons £3,000 each, and the surplus to his

¹ *Hoes v. Van Hoesen*, 1 Coms., 121; *Lupton v. Lupton*, 2 Johns. Ch., 614; *Livingston v. Livingston*, 3 Johns. Ch., 148; *Tole v. Hardy*, 6 Cow., 333; *Dodge v. Manning*, 11 Paige, 334; *Reynolds v. Reynolds*, 2 Smith, 257. But see *Tracy v. Tracy*, 15 Barb., 503.

² *Lupton v. Lupton*, 2 Johns. Ch., 614.

³ *Gould v. Winthrop*, 5 R. I., 319; *Roper on Legacies*, 411; *in re McCracken's Estate*, 29 Penn. St. Rep., 426; *Derby v. Derby*, 4 R. I., 414; *Lewis v. Darling*, 16 How. U. S., 1.

⁴ 1 Pr. Wm., 305.

eldest son. He appointed his wife executrix, and she married B. who wasted the estate. Lord Cowper was of the opinion that the eldest son was to be considered legatee for the value of what would have been the surplus after the payment of the debts and legacies, had there been no waste of the assets, upon the ground of the testator's knowledge of the amount of his property, and of his presumed intention to give the residue as a particular bequest to his eldest son.¹ This decision was questioned by Lord Thurlow in the case of *Fonnereau v. Poyntz*,² where he thought Lord Cowper erred in mixing up the affair of the executrix having wasted the estate. He placed it upon the same basis as though the testator had given legacies larger than the value of the estate, and then the residue to another, when there could be no residue. The general rule on the subject is that the intention of a testator in making a specific bequest, or giving a pecuniary legacy, cannot be controlled by the statement of his fortune.³

This is a mere question of intention on the part of the testator; and if such an intention can be found, the residuary legacy will not abate. Thus, in the case of *Farmer v. Mills*,⁴ the testator gave certain annuities, directing that the sums set apart to secure them, should, as the annuitants died, sink

¹ See preceding note.

² 1 Bro. C. C., 478; and see Lord Eldon in *ex parte Chadwin*, 3 Swans., 387.

³ *Fonnereau v. Poyntz*, 1 Bro. C. C., 478; see Roper on Legacies, 302; *Chambers v. Minchin*, 4 Ves., 675.

⁴ 4 Russ, 86; see also *Scott v. Salmond*, 1 Myl. & K., 363; *Att. Gen. v. Poulden*, 3 Hare, 555.

into the residue of his personal estate. Then, afterwards, by codicil, he stated that it was probable that there might be a deficiency in the interest of his property to pay the annuities, and in such case he directed that an equal deduction should be made from each annuity ratably according to its amount. The estate proving deficient, the question arose whether, upon the death of any annuitant, the sum set apart to secure his reduced annuity should be applied to increase the other annuities, until they made up the amount given by the will in the first instance, or whether it should go to the residuary legatee. Sir John Leach, M. R., held that the testator, by his codicil, had directed the reduction of the annuities in case of deficiency, and therefore, they who received the reduced annuities, received all the testator intended, and so the sum went to the residuary legatee.¹ But in this case had it remained as expressed in the will in the first instance, the residuary legatee would have taken no more than would have remained after making good the annuities, for such would have been the manifest intention of the testator.

And where there is a specific devise of land for the payment of debts, unless the personal estate is manifestly intended to be exonerated, it will still be the primary fund, even though, by so considering it, the general and residuary legacies should abate.²

¹ See preceding note.

² *Rhodes v. Rudge*, 1 Sim., 79; *Dolman v. Weston*, 1 Dick., 26; *Walker v. Hardwick*, 1 M. & K., 397; *White v. White*, 2 Vern., 43; *Doleman v. Smith*, Prec. Ch., 456; *Hartly v. Hurlle*, 5 Ves., 540; *Watson v. Brickwood*, 9 Ves., 447; *Hanna's Appl.*, 31 Penn. St. Rep., 53; *Henry v. Gra-*

This follows from the principle, that although the real estate is charged with the payment of debts, generally or specially, unless it appears that the testator intended to exonerate the personalty, it is still the primary fund, and must be first exhausted. And, since general or pecuniary legacies are not a charge upon the realty unless made so by the testator, if there is not a sufficiency of the personal estate to pay the debts, the pecuniary legacies must fail; or if there be enough only to pay the debts and the general legacies, then the residuary legacy must fail. There is this exception, however, to be kept in mind: where the legacy is not a gratuity, but is based upon a valuable consideration, and is accepted as such, it will not abate with the general legacies.¹ Thus, where the testator gives to his wife a certain sum in lieu of dower, if she accept that sum and relinquish dower, the transaction is in the nature of a contract, and her legacy will not abate with the general legacies.¹ Where the legacies are, with the debts, charged upon the land, the personalty is still the primary fund for their payment, and the land will not be appropriated for that purpose until the personalty is exhausted, unless the testator order

ham, 9 Rich. Eq., 100; *Reynolds v. Reynolds*, 16 N. Y., 257; *Sims v. Sims*, 2 Stockt., 158; *Whitehead v. Gibbons*, ib. 230; *Harrison v. Haskins*, 2 P. & H. (Va.), 388; *Dugan v. Hollins*, 4 Md. Ch. Decis., 139.

¹ *Blower v. Morrett*, 2 Ves. Sen., 420; *Burridge v. Bradley*, 1 Pr. Wm., 127; *Davenhill v. Fletcher*, Ambl., 244; *Heath v. Dendy*, 1 Russ., 543; *Connard's Appl.*, 33 Penn. St. Rep., 47; *Hickey v. Hickey*, 26 Conn., 261; see *Power v. Jenkins*, 13 Md., 443; also *Dugan v. Hollins*, 11 Md., 41; *Gaw v. Huffman*, 12 Gratt., 628; *Mayo v. Bland*, 4 Md. Ch. Dec., 484; *Williamson v. Williamson*, 6 Paige, 298; *Isenhardt v. Brown*, 1 Edw., 411; see *Stewart v. Chambers*, 2 Sandf. Ch., 382.

the land to be absolutely converted into a personal fund for such purpose.¹ It has been held very generally in England and in this country, that where a power of sale of the real estate is given, and the proceeds thereof, together with the personalty, are constituted a joint fund for the payment of debts, legacies, etc., they are to contribute ratably for that purpose.² But the more modern doctrine seems to be that, unless the intention of the testator appear to be to convert the real estate *out and out*, the mere blending of it with the personalty in a common fund, will not exonerate the personal estate from being the primary fund for the payment of debts and legacies.

Where there is a general charge upon the real and personal estate for the payment of legacies, the personal estate being the primary fund, must be first exhausted before the real estate can be appropriated;³ and hence, if a legatee seek to charge the land in

¹ Boughton v. Boughton, 1 House of Lords' Cas., 406; Tidd v. Lister, 3 De G. Macn. & G., 857; Tatlock v. Jenkins, 1 Kay, 654; Tench v. Cheese, 24 L. J. Ch., 717; but see Robinson v. Governor, 10 Hare, 19; Dodge v. Manning, 11 Paige, 334; McKay v. Green, 3 Johns. Ch., 56; Hoes v. Van Hoesen, 1 Coms., 120; Kelsey v. Western, 2 Comst., 500; Dodge v. Manning, 1 Comst., 298; Chase v. Lockerman, 11 Gill. & J., 186; Fenwick v. Chapman, 9 Pet., 466; Leavitt v. Wooster, 14 N. H., 550; Hancock v. Minot, 8 Pick., 29; but see Lewis v. Darling, 16 How. U. S., 10.

² Cradock v. Owen, 2 Sm. & Giff., 241; Robinson v. Governors, 10 Hare, 19; Tatlock v. Jenkins, 1 Kay, 654; Simmons v. Rose, 20 Jur., 73; Elliott v. Carter, 9 Gratt., 541; Ford v. Gaithur, 2 Rich. Eq., 270; McCampbell v. McCampbell, 5 Litt., 99; see Cryders' Appl., 11 Penn. St. Rep., 72; Loomis' Appl., 10 Barr., 387.

³ Dodge v. Manning, 11 Paige, 334; McKay v. Green, 3 Johns. Ch., 56; Hoes v. Van Hoesen, 1 Coms., 120; Hanna's Appl., 31 Penn. St. Rep., 53; Whitehead v. Gibbons, 2 Stockt., 230.

the hands of the heir or devisee, he must show that the personal estate has been exhausted.¹ And where sufficient personal property came into the hands of the executor to pay the debts and legacies, and he has wasted it, the real estate, though generally charged, will not be liable;² because it is deemed to have been the intention of the testator to charge the lands only upon the insufficiency of the personal estate.

There is a distinction to be observed between a general charge of legacies upon the estate or land, and a devise of land subject to the payment of a specified sum of money: for in such case the specified sum must come out of such land, as the gift is contained only in such direction;³ and this will exonerate the personalty from the payment of such sum. In this a legacy differs from a debt: for the debt was a pre-existing charge upon the personal estate, and such direction of the testator does not indicate an intention to remove it; while the legacy, in its very creation, was made a specific charge upon the realty.⁴

As a general rule, where the legacies are a charge on the real and personal estate, they are a specific lien thereon, and cannot be divested, except by pay-

¹ *Dodge v. Manning*, 1 Coms., 298; *Stuart v. Kissam*, 11 Barb., 271; *Fisher v. Fisher*, 1 Bradf., 335; *Dodge v. Manning*, 11 Paige, 334; *Hoes v. Van Hoesen*, 1 Coms., 120.

² *Hanna's Appl.*, 31 Penn. St. Rep., 53; *Sims v. Sims*, 2 Stockt., 158; *Quere*, in New York, see *Wilks v. Harper*, 3 Sandf. Ch., 6; *Sims v. Lively*, 14 B. Monr., 433.

³ *Phipps v. Amnesley*, 2 Atk., 57; *Wood v. Dudley*, 2 Bro. C. C., 316; *Spurway v. Glyn*, 9 Ves., 483; *Hoover v. Hoover*, 5 Barr., 351; *Holliday v. Summerville*, 3 Penn. St. Rep., 533.

⁴ *Noel v. Lord Henly*, 7 Pri., 241; 2 Jarm. Pow. Dev., 708.

ment or release, or by a decree in a suit to which the legatees or their representatives are parties.¹

As the question whether the legacies are to be a charge on the land or not depends upon the manifest intention of the testator, either expressed or implied, that intention must be sought after in the instrument itself. There are certain expressions which are deemed sufficient, when taken in connection with circumstances to indicate such intention: as, where the testator gives several legacies, and, without creating an express trust for their payment, makes a general residuary disposition of his whole estate, real and personal, blending them together in a common fund, the real estate, if necessary for their payment, will be charged.² So also, from the expressions of the testator, certain legacies may be deemed to be a charge upon the realty, and others not: as, when the testator devises lands subject to debts and all legacies *thereafter mentioned*, and then proceeds to give several legacies, directing that they be paid by the devisee.³ The court will look

¹ *Jenkins v. Fryer*, 4 Paige, 47; *Birdsall v. Hewlett*, 1 Paige, 32; *Dodge v. Manning*, 11 Paige, 334; *ib.* 1 Coms., 298; *Harris v. Fly*, 7 Paige, 421; *Livingston v. Freeland*, 3 Barb. Ch., 510; *Tracey v. Tracey*, 15 Barb., 503; *Rafferty v. Clark*, 1 Bradf., 473; *Terlume v. Colton*, 2 Stockt., 21; *Nillons v. Truax*, 6 Ohio (N. S.), 97; *Clyde v. Simpson*, 4 Ohio (N. S.), 445; *Copp v. Hersey*, 11 Foster, 317.

² *Hill on Trustees*, 360, cites *Aubrey v. Middleton*, 2 Eq. Ca. Abr., 479; *Hassel v. Hassel*, 2 Dick., 526; *Brudenell v. Boughton*, 2 Atk., 268; *Bench v. Biles*, 4 Mad., 187; *Cole v. Turner*, 4 Russ., 376; *Mirehouse v. Scaife*, 2 M. & Cr., 695, 707, etc; see *Buckley v. Buckley*, 11 Barb., 43; *Tracy v. Tracy*, 15 Barb., 503; *Lupton v. Lupton*, 2 John. Ch., 614; *Lewis v. Darling*, 16 How. U. S. 10; *McGlaughlin's Ex'rs v. McGlaughlin's Adm'rs.*, 24 Penn. St. Rep., 22; *Carter v. Balfour*, 19 Alab., 815.

³ See *Home v. Medcraft*, 1 Bro. C. C., 261; *Radburn v. Jervis*, 3 Beav., 450; *Strong v. Ingram*, 6 Sim., 197.

into the whole will, and determine, as far as possible, the real intention of the testator: and these trusts will depend upon that intent, as in other cases; for here, too, *the intent guides the use*.

When it is found to be the intention of the testator to charge the real estate with the payment of his legacies, and a lien attaches thereto, in case of deficiency, those legacies which are of the same order, abate ratably, unless a contrary intent is found in the will. It is competent for the testator to prefer the payment of those which the law deems to be of the same order, one above the other, and this preference may be gathered from the testator's expressions.¹ But courts are averse to construing circumstances so as to find that the testator intended to favor one of the same class above another. They very properly infer that the testator, had he intended any such favoritism, would have made that intention manifest in some other way than by leaving it to inference.²

It has already been observed that legacies are held to abate in a certain order, where there is a deficiency for the payment of all. But the testator can change this order if he thinks proper to do so. General or pecuniary legacies will abate before specific, because, when the testator has given a specific article to a particular individual, or a specific sum

¹ Murdock's Appl., 31 Penn. St. Rep., 47; *Masters v. Masters*, 1 P. Wm., 423; *Wood v. Vandeburgh*, 6 Paige, 277; *Marsh v. Evans*, 1 P. Wm., 668; *Pepper v. Bloomfield*, 3 Dr. & W., 499.

² See on this point *Heron v. Heron*, 2 Atk., 171; *Coppin v. Coppin*, 2 P. Wm., 292; *Hume v. Edwards*, 3 Atk., 693; *Apreece v. Apreece*, 1 Ves. & Bea., 364.

to be paid out of a specific fund or specified property, and has made no other disposition of the same, such intention will not be overruled by the court, unless there is an imperative necessity arising out of the will of the testator; or that which is of higher authority than his will, his legal and equitable obligations to be *first just before he is generous*.

This subject will be more fully considered under the respective titles of *trustees* and *cestui que trusts*.

TRUSTS FOR RAISING PORTIONS.

This takes place where a term of years is carved out of an estate, and limited to trustees to secure the payment of certain sums of money to be paid to children at a future time; such as on their arriving respectively at the age of twenty-one years, or on the happening of some contingent event, as on their marriage, etc. In such instances the sum or sums to be paid become a charge on the estate, and the land becomes a primary fund for their payment.¹ It frequently happens that the event or the period fixing the time for the payment of these portions transpires before the determination of the particular estate, after which the remainder expectant, by which the portion is secured, is limited. Thus, in *Jefferies v. Reynous*,² exchequer annuities were settled upon husband and wife for their lives, and, after their deaths, for the children of the marriage,

¹ *Lechmere v. Charlton*, 15 Ves., 193; *Lanoy v. Duke of A.*, 2 Atk., 444.

² Stated 9 Ves., 311.

in equal shares, to be assigned and made over to them at their ages of twenty-one happening after the death of the surviving parent; but if any one of them attain twenty-one during the lives of their parents, their shares were to be paid, assigned and made over within three months after the death of the survivor of the parents, unless sooner directed; and if any of them die before their shares become payable, assignable or transferable, survivorship among the children was provided. It was further declared that if there should be no child, or, there being children, all of them die before their shares became payable, assignable or transferable, as aforesaid, the annuities should go to the parents and the survivor of them. There was only one child a son, and he attained the age of twenty-one, but died before his mother, who survived her husband. The question arose whether the executor of the son or the executor of the mother should have the fund. It was held, first at the Rolls, afterwards by Lord Northington, C., and ultimately by the House of Lords, that the son's executor was entitled. The decision is upon the principle that the interest vested immediately on the son's arriving at the age of twenty-one, although the time of payment was postponed until the death of the parents.¹

¹ *Jefferies v. Reynous*, stated in 9 Ves., 311. Mr. Roper calls attention to the following authorities as illustrating this subject: *Emperor v. Rolfe*, 1 Ves. Sen., 208; *Evans v. Scott*, 11 Jur., 291; *Randall v. Metcalf*, 3 Bro. Par. Cas., 318, (8vo. ed.); *Willis v. Willis*, 3 Ves., 51; *Hope v. Lord Clifden*, 6 Ves., 499; *Schenck v. Legh*, 9 Ves., 300; *Powiss v. Burdett*, ib. 428; *Bayard v. Smith*, 14 Ves., 470; *Walker v. Maine*, 1 Jac. & Walk., 1, 8; *Howgrave v. Cartier*, 3 Ves. & Bea., 79; *Perfect v. Lord Curzon*, 5

The reason for this rule of interpretation is given by Mr. Roper¹ in these words: "A child who has attained the age of twenty-one, or married, is *prima facie* to be considered entitled to a portion provided for children, upon the ground that an intention is not to be imputed to a father to leave his child, having occasion for a fortune, without one; and, to form an exception to the rule, it must be shown, from the tenor of the words of the will or settlement, that the child was not meant to have the provision at that age; an intention that must not be doubtful, but clear.² There must be something in the instrument utterly incompatible with giving the portion at twenty-one. If, then, the terms of the instrument be ambiguous, or if there be conflicting or contradictory clauses, so as to leave in a degree uncertain the period at, or the contingency upon which the portion is to vest or be divested, it is the inclination of the court to vest the money in sons at twenty-one, and daughters at that age or marriage.³ Hence it follows that if the portion be given

Madd., 442; Maitland v. Calie, 6 ib., 243; Bielefield v. Record, 2 Sim., 354; Bright v. Rowe, 3 Myl. & K., 316; Mocatto v. Lindo, 9 Sim., 56; Cort v. Winder, 1 Coll., 320; Whiting v. Force, 2 Beav. 571; Casamajor v. Strode, 8 Jur., 14; to which may be added Swallow v. Binns, 1 Kay & Johns., 417; S. C., 19 Jur., 483; Whatford v. Moore, 2 M. & Cr., 291; Woodcock v. Duke of Dorset, 3 Bro. C. C., 569; Kinge v. Hake, 9 Ves., 438; Jones v. Jones, 13 Sim., 568; see also Pinney v. Fancher, 3 Brad., 198; Parsons v. Lyman, 4 Brad., 208; Letchworth's Appl., 30 Penn. St., R., 175; Everett v. Mount, 22 Geo., 323.

¹ Roper on Legacies, 626; Howgrave v. Cartier, 3 Ves. & Bea., 85, 91; Hope v. Lord Clifden, 6 Ves., 507; Bernard v. Montague, 8 Cl. & Fin., 74.

² Bernard v. Montague, 8 Cl. & Fin., 74; Dominiek v. Moore, 2 Brad., 201; Devane v. Larkins, 3 Jones' Eq., 377; High v. Worley, 32 Alab., 709.

³ Hargrave v. Cartier, 3 Ves. & Bea., 79; Bowman v. Long, 23 Georgia, 242; Cox v. McKinney, 32 Alab., 416; High v. Worley, 32 Alab., 709.

over in language which is capable of being referred either to the death of children before twenty-one, or during the lives of their parents, the expressions will be restricted to the period of vesting; that is, in the event of death under twenty-one: for a court of equity deems it very unreasonable to suppose a father to mean that his child, having attained twenty-one, or married and founded a family, should not take its portion because it happens to die before him.¹

But whether the portions are to be raised during the life time of the parents, and consequently, before the termination of the particular estate, or whether not until the death of the parents, is a question which must depend upon the manifest intention of the settler or testator, as gathered from the instrument, without calling in aid any extraneous matter.² While the court in construing the instrument will not be eager to lay hold of circumstances, and will hold an equal mind, yet, unless compelled to the contrary conclusion, they will presume it was intended that the child should take a *vested interest* in the portion, at the age of twenty-one, or at marriage; and that the period of payment was only deferred until the determination of the preceding estate.³ But there may be expressions

¹ Roper on Leg., 626; *Hope v. Lord Clifden*, 6 Ves., 504, 507; *Thompson v. Thompson*, 28 Barb., 432; *Duane v. Larkins*, 3 Jones' Eq., 377; *Petty v. Moore*, 5 Sneed, 126; *Moore v. Dimond*, 5 R. I., 121; *Brown v. Williams*, ib., 309; *ex parte Turk*, 1 Brad. (N. Y.), 110; *Dominick v. Moore*, 2 Brad., 201.

² *Corbet v. Maydwell*, 2 Vern., 641.

³ *Swallow v. Binns*, 1 Kay & Johns., 417; *Whatford v. Moore*, 7 Sim., 574; S. C., M. & Cr., 274; *Hotchkin v. Humfry*, 2 Madd., 65; *Fitzgerald*

which will compel a different conclusion; as, when the portions are to be raised *from and after* the commencement of the term:¹ hence, not until the death of the parents, or the one for whose life the particular term was limited.

The questions raised upon this point, are usually between the representatives of the deceased child or children, and those of the parent; and much litigation would be avoided if settlers and testators would be more careful to determine, at the time of framing the instrument, the time when the portion is to vest in the children, and not leave it to mere construction.

It is to be observed that these portions to be raised are a charge on the lands by which they are secured; and, hence, they are usually raised by renting, mortgaging, or selling the term. The land is the primary fund, even in cases where the settler covenants in the settlement to pay the amount. Consequently, where there is no such covenant in the settlement, there is no debt created against the settler which can be enforced against his personal estate.² The *mode* of raising these portions, whether

v. Field, 1 Russ., 430; *Thompson v. Thompson*, 28 Barb., 432; *Braddon v. Cannon*, 1 Grant's Ca., (Penn.), 60; *Devane v. Larkins*, 3 Jones' Eq., 377; *Freeman v. Okey*, 3 Jones' Eq., 473; *Hall v. Robinson*, 3 Jones' Eq., 348; *Bowman v. Long*, 23 Geo., 242; *Cox v. McKinney*, 32 Alab., 461; *Thrasher v. Ingraham*, 32 Alab., 645; *Hugh v. Worley*, 32 Alab., 709; *Petty v. Moore*, 5 Sneed, 126; *ex parte Turk*, 1 Bradf., 110.

¹ *Butler v. Duncomb*, 1 Pr. Wm., 448; *Wynter v. Bold*, 1 S. & St., 507.

² *Lanoy v. Duke of Athol*, 2 Atk., 444; *Lechmere v. Charlton*, 15 Ves., 193; *Edwards v. Freeman*, 2 P. Wm., 437; *Burgoyne v. Fox*, 1 Atk., 576; *Fox v. Phelps*, 17 Wend., 393, also 20 Wend., 437; *Robinson v. Townshend*, 3 G. & J., 413; see also *Hawley v. James*, 5 Paige, 318.

by rent, mortgage or sale, will be more appropriately considered when the *duties of trustees* and the *rights of cestuis que trust* are being discussed.

In New York there are statutes which modify somewhat the law on the subject of raising portions. It is provided¹ that every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in the statute; and the power of alienation will be deemed to be suspended, where there are no persons in being by whom an absolute fee in possession can be conveyed. By the 15th section, the period of suspension is fixed as not longer than the continuance of two lives in being at the time of the creation of the estate; except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the person to whom the first remainder is limited, shall die under the age of twenty-one years; or upon any other contingency, by which the estate of such persons shall be determined before they arrive at the age of twenty-one, or full age. And it is further provided,² that accumulation of rents and profits of real estate for the benefit of one or more persons, may be directed by any will or deed, sufficient to pass real estate, as follows:

1. If such accumulation be directed to commence on the *creation* of the estate, out of which the rents and profits are to arise, it must be made for the

¹ 2 R. S., 1846, p. 10, sec. 14, 15, 16.

² Sec. 37, p. 12. 2 R. St., 1846.

benefit of one or more minors then in being ; and to terminate at the expiration of their minority.

2. If such accumulation be directed to commence at any time *subsequent* to the creation of the estate, out of which the rents and profits are to arise, it shall commence within the time permitted in the statute, for the vesting of future estates, and during the minority of the persons for whose benefit it is directed, and shall terminate at the expiration of such minority.

Where the accumulations are directed for a longer period than during the minority of the person intended to be benefitted, the excess of time is void ; and all other directions for accumulations other than those provided for are to be void. By observing these provisions of the statute, the decisions of the courts in New York, upon the subject of raising portions by accumulation and the creation of future estates, will be better understood.



DIVISION II.

OF TRUSTEES AND THEIR INCIDENTAL RIGHTS, POWERS AND LIABILITIES.

CHAPTER I.

WHO MAY BE A TRUSTEE.

SECTION I. THE LEGAL REQUISITES OF A TRUSTEE.

Having considered the nature of trusts—the different kinds—and also the various methods by which they are created and raised, it is next proper to enquire: Who may be a trustee? It may be stated, as a general principle, that all persons capable of taking the beneficial interest in property may become trustees for others.¹ This rule, however, does not necessarily include all who may become trustees under the operations of certain legal rules. It is a well established principle in equity that a trust shall not fail for want of a trustee. Hence, in cases of the death, disability or non-appointment of a trustee, the court will follow

¹ 2 Fonbl. Eq., 139, (n).

the subject matter of the trust into the hands of the holder, and treat him as trustee, unless he is entitled to the protection of the court as a *bona fide* purchaser, without notice.¹ Hence, every class, character and profession of individuals are liable to become trustees for certain purposes and to certain extents. Not only may individuals of every class, character and profession become trustees, but corporations, and even unincorporated associations of individuals, may become trustees for certain purposes and objects.²

SECTION II. THE KING AS TRUSTEE IN ENGLAND—THE STATE IN THIS COUNTRY.

In the case of *Burgess v. Wheate*,³ Sir Thomas Clark, Master of the Rolls, in making a distinction between trust estates vested in the crown by escheat, and those to which it becomes entitled by forfeiture, says: "The crown takes an estate by forfeiture subject to the engagements and incumbrances of the person forfeiting. The crown holds

¹ *King v. Donnelly*, 5 Paige, 46; *Dawson v. Dawson*, Rice's Eq., 243; *Cushney v. Henry*, 4 Paige, 345; *McIntyre School v. Zanesville C. and M. Co.*, 9 Ham., 203; *Sand. Uses*, 349; 2 Foub. Eq., 142 (*n*); *Story's Eq.*, sec. 976; *Hill on Trustees*, 48; 1 Madd. Ch. P., 580; *De Burante v. Gott*, 6 Barb., S. C., 492; 1 Sugd. V. and P., 171; *Malin v. Malin*, 1 Wend., 625; *Kerr v. Day*, 14 Penn. St., 114.

² *Green v. Rutherford*, 1 Ves. Sr., 468; *Att'y Gen. v. Landerfield*, 9 Mod., 287; *Trustees of Phillips's Acad. v. King*, 12 Mass., 546; *Pickering v. Shotwell*, 10 Barr., 27; *Magell v. Brown*, Bright N. P., 350; *Mayor and Corp. Philadelphia v. Elliott*, 3 Rawle Rep., 170; 2 Sandf. Ch. Rep., 138; *Potter v. Chapin*, 6 Paige Rep., 639, 649.

³ 1 Ed., 255; see *Kildare v. Eustace*, 1 Vern., 439; *Wilkes' Case*, Lan., 54.

in this case as royal trustee." Lord Mansfield, in his judgment in the same case, sustained the same principle. Upon the question whether the king should be liable to an equity of redemption upon a legal estate, Lord Hale thought he should; because it was an ancient right which the party is entitled to in equity.¹ Lord Keeper Northington, in the case of *Burgess v. Wheate*, while he declined giving an opinion on the question of the crown's liability as trustee, remarked that although Lord Hale and Baron Atkyns thought the king should be liable, because they saw the same equity against the crown as against a common person, they only recognized the equity without declaring the remedy. Said the Lord Keeper: "Whether this remedy has since been settled in the Exchequer, where it alone can be, I really don't know; but I hope it is so settled, for I see a great deal of equity to support the opinion of Hale and Atkyns. I hope there is no equity the subject is not entitled to against the crown. But I own, upon very diligent inquiry and consideration of the case, I at present think the arms of equity are very short against the prerogative."²

Mr. Lewin remarks,³ "The sovereign may sustain the character of a trustee so far as regards capacity to take the estate, and to execute the trust; but great doubts have been entertained whether the

¹ *Pawlett v. Att'y Gen.*, Heard., 467.

² *Pawlett v. Att'y Gen.*, *ut supra*; *Reeve v. Att'y Gen.*, 2 Atk., 223; *Giles v. Grovey*, 6 Bligh, N. S., 392; see also *Prescott v. Tyler*, 1 Jur., 470; *Casbord v. Ward*, 6 Price, 44; *Penn v. Ld. Baltimore*, 1 Ves. Sr., 453.

³ Lewin on Trustees, etc., 30.

subject can, by any legal process, enforce the performance of the trust. The *right* of the *cestui que trust* is sufficiently clear, but the defect lies in the *remedy*. The Court of Chancery has no jurisdiction over the king's conscience, for that is a power delegated by the king to the chancellor, to exercise the king's equitable authority betwixt subject and subject. The Court of Exchequer has, in its character of a court of revenue, an especial superintendence over the royal property; and it has been thought, that through that channel, a *cestui que trust* might indirectly obtain the relief to which, on the general principles of equity, he is confessedly entitled." Since the crown is the fountain of equity as between subject and subject, the court ought not to suppose it capable of withholding equity from the subject. It is a maxim of the law *that the king can do no wrong*, not from lack of power, but from lack of disposition. Then why not add the other as a corollary, *that the king can withhold no right*?

But whatever may be the law on this subject in England, it is pretty well settled in this country that the state may be trustee. Says Chancellor Kent,¹ "It is a general principle in American law, and which, I presume, is everywhere declared and asserted, that where the title to lands fails from defect of the heirs or devisees, it necessarily reverts or escheats to the people (state), as forming a part of the common stock to which the whole community is entitled. Thus, whenever the owner dies

¹ 4 Kent's Com., 424; see also note (a), 9th ed., and p. 427.

intestate, without leaving any inheritable blood, or if the relations are aliens, there is a failure of competent heirs, and the land vests immediately in the state by operation of law :''¹ and it is a further rule of law, that the state, on taking lands by escheat, and even forfeiture, takes the title which the party had and no other. The land is taken in the plight and extent by which he held it; and the estate of the remainder-man is not destroyed or divested by the forfeiture of the particular estate.² In most of the states these matters have been regulated by statute, so that whatever doubts might have arisen under the common law, there remains none under the statutes defining the rights and duties of the parties.³

Thus by the Revised Statutes of New York³ it is provided that all escheated lands, when held by the State or its grantees, shall be subject to the same trusts, incumbrances, &c., as they would have been had they descended; and the Court of Chancery is empowered to direct the Attorney General to convey the lands to the parties equitably entitled, or to trustees.⁴ So also the Statute of Alabama⁵ pro-

¹ *People v. Conklin*, 2 Hill R., 67.

² *Mooers v. White*, 6 John. Ch., 360; *Farmers' Loan and Trust Co. v. People*, 1 Sandf. Ch., 139; 4 Kent's Com., 427; *Borland v. Dean*, 4 Mason R., 174.

³ See *McDonogh's Ex'ors v. Murdock*, 15 How. U. S., 367; Rev. Stat. N. Y., part I., chap. 1, art. 1, sec. 2, 3d ed.; *Movers v. White*, 6 J. C. R., 360, 367; Virg. Code, 1849, tit. 32, chap. 113, sec. 26; Kentucky Act, 29 Sep., 1787, sec. 11.

⁴ *Mooers v. White*, 6 Johns. Ch. R., 365; *Farmers' L. Co. v. People*, 1 Sandf. Ch., 139.

⁵ Clay's Dig., 189, sec. 1 and 9.

vides that the estate, both real and personal, of persons within their State who have died intestate, or who may hereafter die intestate, leaving no lawful heir or heirs, shall be considered as escheated to the State of Alabama :”¹ and it further provides that nothing herein contained shall prejudice the rights of creditors, or other individuals having claims or legal titles, or who shall be under the disabilities of infancy, coverture, duress, lunacy, or beyond the limits of the United States, until three years after the disability shall be removed.¹ In Pennsylvania, act 29 Sept., 1787, § 11,² provides that in case of escheat, the state is to take no other or greater title than the person dying intestate had.² So also in Virginia, an estate vested in a person by way of mortgage or trust is not to escheat or be forfeited, merely by reason of his being an alien, or dying without heirs.³ Thus the spirit of the American law upon this subject is, that the state, taking lands by escheat or forfeiture, takes the title which the party had and no other; consequently it is quite liable to hold in trust for those who have equitable estates in lands which are escheated or forfeited thereto.

It is indeed difficult to conceive of any substantial reason why the subject or citizen should not be entitled to all his equitable rights against the state or the crown. The very existence of government is for the purpose of securing to all the peaceful pos-

¹ See preceding note.

² Dunlop, 163, 3d ed.

³ Code, 1849, tit. 32, ch. 113, sec. 26.

session and enjoyment of their rights. Therefore the supposition that the government, which is the fountain of justice to the subject, can withhold from him his equitable rights, is legally impossible; and well might Lord Keeper Northington say, "that he hoped there was no equity, that the subject is not entitled to against the crown."¹

SECTION III. CORPORATIONS AS TRUSTEES.

Of corporations there are several kinds, and they are primarily divided into aggregate and sole corporations. A sole corporation consists of a single person, who is made a body corporate and politic for the purpose of endowing him with legal capacities which a natural person does not possess, such as perpetuity, etc. In England, a bishop, a dean, a vicar, etc., are examples of sole corporations; and they and their successors in office, take the corporate property and privileges *in perpetuity* for the benefit of the office, etc. Hence, in this character and relation they become trustees.² But sole corporations are not favored in the United States; and, with us, corporations generally in use are aggregate, formed by the union of two or more individuals in one body politic, with a capacity of succession and perpetuity.³

In New York, by special enactment,⁴ it is pro-

¹ *Burges v. Wheat.*, 1 Ed. 225.

² *Per. Story, Jr.*, 4 *Wheat.*, 667; *Brunswick v. Dunning*, 7 *Mass.*, 447; *Weston v. Hunt*, 2 *Mass.*, 501; *Jansen v. Ostrander*, 1 *Cow.*, 670, 684.

³ 2 *Kent. Com.*, 273; *McGirr v. Aaron*, 1 *Penn. Rep.*, 51.

⁴ 1855 Session Laws, chap. 230, p. 338, passed April 9, 1855.

vided that no interest in property shall be conveyable or descendable to the successor of ecclesiastics; and that none but legal corporations shall be capable of thus taking. It is also provided that no grant, conveyance, devise or lease of lands consecrated, dedicated or appropriated or intended to be for purposes of religious worship, for the use of the congregation or society shall vest any title in the person to whom the grant shall be made, unless made to a corporation organized under the law for incorporating such societies, etc. It further provides, that all such property so held, shall, on the death of the person to whom it has been conveyed, descend to and be held in trust for, such congregation or society, if there be any legally entitled to take: if not, shall escheat to the people; and the commissioners of the land office may convey to such congregation when, by being incorporated, they become capable of taking.

The object of the institution of aggregate corporations is to enable many individuals to act as one, by one united will; and to continue their joint powers and franchises, undisturbed by the change of members. These artificial persons are the creatures of law, and usually are created for particular purposes, and are confined in their action within the scope of those purposes. Such corporations may become trustees, especially within the scope of the purposes for which they were instituted.¹ They

¹ Trustees of Phillips's Academy *v.* King, 12 Mass., 546; Vidal *v.* Girard, 2 How. U. S., 187; Columbia Bridge Company *v.* Kline, Bright. N. P., 320; Green *v.* Rutherford, 1 Ves. Sen., 468.

may be constituted trustees to the same extent as private individuals, upon the same principle. A private individual is incapable of holding as trustee, any property, the legal estate in which, he cannot acquire and hold. So, a corporation cannot hold as trustee of real estate, unless, under its constitution, or by legal permission, it may acquire and hold the legal estate therein.¹ But where lands are devised to a corporation which is not legally capable of taking and holding real estate, in trust, for lawful purposes, although at law the trust is void, in equity, under the rule that a trust shall not fail for want of a trustee, the trust will be maintained, and the heir will be decreed to be a trustee for the uses of the will.² This doctrine has been somewhat questioned. It is held in the case of *Jackson v. Hartwell*,³ that a corporation cannot be seised of lands in trust for purposes foreign to its institution. It was also discussed at considerable length in the case of *The Trustees of Phillips's Academy v. King*,⁴ by Justice Thatcher. It was also held in the case of *The First Parish in Sutton v. Cole*,⁵ that corporations created for specific objects, have no power to take

¹ *Att'y Gen. v. Ironmongers' Co.*, 2 Beav., 313; 2 Fonbl. Eq., 139, note; *Jackson v. Hartwell*, 8 J. Rep., 422; 3 Rev. Stat. N. Y., 292, § 4; *Willard's Eq.*, 734; *Nicoll v. N. Y. & E. R. R. Co.*, 12 Barb. 460; *aff'd*, 2 Kern., 121.

² *Powley v. Clockmakers' Co.*, 1 Bro. C. C., 81; *Vidal v. Girard*, 2 How., U. S., 187; but see *Andrew v. B. Society*, 4 Sand. S. C., 156; *Ayers v. Methodist Ch.*, 3 Sandf. S. C., 352.

³ 8 Johns., 422.

⁴ 12 Mass., 546; see *Andrew v. B. Society*, *ut supra*; *Ayers v. Methodist Ch.*, *ut supra*.

⁵ 3 Pick., 232.

and hold real estate for purposes foreign to those objects. As a general rule, a corporation has no power except what is given by its charter or incorporating act, either expressly or as incidental to its existence; consequently, whether a particular corporation can be constituted a trustee for any specific purpose or use, must be determined by an examination of its charter or incorporating act.¹

Mr. Justice Story in delivering the opinion of the Supreme Court of the United States in the case of *Vidal et al. v. The Mayor, &c., of Philadelphia*, said, "there is no positive objection, in point of law, to a corporation taking property upon trust not strictly within the scope of the direct purposes of its institution, but collateral to them, nay, for the benefit of a stranger or another corporation."² In the case of the *Trustees of Phillips's Academy v. King*,³ Mr. Justice Thatcher expressed his surprise that the question whether corporations are capable of taking and holding property as trustees, should be one of general inquiry, since these bodies are the mere creatures of the legislature, which can invest them with powers more or less enlarged, according to its own good pleasure. In *Matter of Howe*⁴ the Chancellor remarked: "It is a general rule that corporations cannot exercise any powers not given to them

¹ See *Head v. Providence Insurance Company*, 2 Cranch, 127; *Dartmouth College v. Woodward*, 4 Wheat., 636; *State v. Stebbins*, 1 Stew., 299; *Beaty v. Knowler*, 4 Pet., 152; *Beaty v. Marine In. Co.*, 2 Johns., 109; *People v. Utica Ins. Co.*, 15 Johns., 358, 2 Cowen, 675.

² 2 How. U. S. R., 128.

³ 12 Mass., 546.

⁴ 1 Paige Ch. R., 214; but see *Jackson v. Hartwell*, 8 Johns., 422.

by their charters, or acts of incorporation, and for that reason they cannot act as trustees in relation to any matters in which the corporation has no interest. But wherever property is devised or granted to a corporation partly for its own use, and partly for the use of others, the power of the corporation to take and hold the property for its own use carries with it, as a necessary incident, the power to execute that part of the trust which relates to others.”¹ If the trust be repugnant to, or inconsistent with the proper purposes for which the corporation was created, it furnishes a ground why the corporation may not be compellable to execute the trust; but it will furnish no ground for declaring the trust void if otherwise unexceptionable. It will simply require a new trustee to be substituted by the proper court possessing equity jurisdiction to enforce and perfect the objects of the trust.²

Towns, counties, hundreds, etc., are *quasi* corporations, and as such are capable of becoming trustees.³ So likewise overseers of the poor, supervisors of a county, etc., are invested with corporate powers *sub modo*, for certain specific purposes, and can become trustees within the sphere of their official duties.⁴ These *quasi* corporations are numerous and varied: as the Commissioners of Roads in South

¹ See preceding note.

² *Vidal et al. v. Mayor, &c., ut supra*; *Angel & Ames on Corp.*, 124-130; 1 *Kyd on Corp.*, 72.

³ *Mayor of Philadelphia v. Elliot*, 3 *Rawle*, 171; *Vidal et al. v. Girard's Ex'rs*, 2 *How. U. S.*, 127.

⁴ *North Hempsted v. Hempsted*, 2 *Wend.*, 109; *Jansen v. Ostrander*, 1 *Cow. R.*, 670.

Carolina;¹ Trustees of the Poor in Mississippi; also, Trustees of the School Fund.² These offices depend not, for their existence, upon those who hold official positions, but continue from one officer to his successor in office. Hence, a debt due to the office, contracted during the administration of the predecessor, in his official character, may be sued for and collected by the successor; and where a debt is contracted in an official capacity, the debt is against the office; and hence, where officers contract debts in their official character and go out of office, the action must be against their successors.³ These *quasi* corporations, which are such for certain special purposes, are held to be incapable of taking and holding lands, as trustees, for purposes foreign to their existence. Thus, in New York, the supervisors of a county are held to be a corporation for certain special purposes, and therefore incapable of taking and holding lands as trustees for the use of an individual or of the inhabitants of a village, or indeed for any use or purpose other than that of the county which they represent.³

¹ Com. Roads *v.* McPherson, 1 Spen. R., 218.

² Gov. *v.* Gridley, Walker R., 328; Carmichal *v.* Trustees, &c., 3 How. (Miss.) R., 84.

³ Jackson *v.* Hartwell, 8 Johns. R., 422; Chapin *v.* School District, 3 N. H., 445; Matter of Howe, 1 Paige, 214; Tucker *v.* St. Clement's church, 4 Seld., 558; Williams *v.* Williams, 4 Seld. 525; American Colonization Society *v.* Gartrell, 23 Georgia, 448.

SECTION IV. VOLUNTARY ASSOCIATIONS OR UNINCORPORATED COMPANIES AS TRUSTEES.

In Pennsylvania, in the case of *Magill v. Brown* (Zane's case),¹ the court remarked that the spirit of all the constitutions in the states was in favor of protecting the rights of religious, literary and charitable societies; and that all bodies united for such purposes were corporations by prescription. It was also held, in the same case, that bequests to unincorporated societies of such character were good. The same doctrine was held in the case of *Zimmerman v. Anders*.² In the case of *Beaver v. Tilson*,³ the court remarked that religious and charitable institutions had always been favored, without respect to form, and that it was immaterial in case of a will how vague and uncertain the objects of the charity might be, provided there was a discretionary power vested somewhere over the application of the testator's bounty to those objects.³ In the case of *Pickering v. Shotwell*,⁴ the testator, Sheppard, gave certain legacies to his children, payable at twenty-one, and the income of his whole estate to the mainte-

¹ Bright's Rep., 350; *Am. Bible So. v. Wetmore*, 17 Conn., 181; *Pickering v. Shotwell*, 10 Barr., 27.

² 6 S. & W., 220; *Tucker v. Seaman's Aid Society*, 7 Met., 188; *Hornbeck's Ex'rs. v. American B. So.*, 2 Sandf. Ch. R., 133; *Banks v. Phelan*, 4 Barb., 80.

³ 8 Barr, 327; *Ex'rs of Barr & Smith*, 7 Verm., 241.

⁴ 10 Barr., 23; see *Beatty v. Kurtz*, 2 Peters, 582; *Town of Pawlet v. Clark*, 9 Cranch, 292 & 331; *Inglis v. Trustees of Sailor's Snug Harbor*, 3 Peters, 99; *Terret v. Taylor*, 9 Cranch, 43, 53; see 9 Cranch, 329; 2 Pet., 580.

nance of his wife and children until they should receive their legacies—remainder to his wife for life, “and from and immediately after her decease, all the said residue of my estate shall go to and be applied under the direction of the monthly meeting of Friends of Philadelphia for the northern district, as a fund for the distribution of good books among poor people in the back part of Pennsylvania; or to the support of an institution or free school in or near Philadelphia.” It was claimed that the devise was void, both for uncertainty as to trustees and as to objects. That where the objects were uncertain, it was essential that trustees should be appointed who could take the legal estate and manage the charity; and that in this case the trustees were an unincorporated body, incapable of succession. That although the meeting might possibly take for its own benefit, yet it could not be trustee for others, etc. Gibson, chief justice, held that the objection was not well taken. That the essential provisions of the statute of charitable uses were a part of the common law of Pennsylvania; and that the objection to the uncertainty of trustees would not be good in England, as a bequest to an executor not nominated, or to one nominated but who died before the testator, would be executed in equity, where the object is a charitable one; therefore, an equal uncertainty as to trustees would not vitiate in the like case in Pennsylvania. That before their statute of self-incorporation, bequests to unincorporated religious congregations, or to literary or charitable associations, were frequent; and, indeed, there had

been not a few since—yet they had all been supported without assistance from the specific powers of a court of chancery. In the case of *Magill v. Brown*,¹ this subject was fully considered, and the decisions of the United States Supreme Court thoroughly examined, and the judgment of the court was, that unincorporated religious societies, like the yearly and monthly meetings of Friends, could take under bequests both of real and personal estate. It has been objected that an unincorporated association cannot take as trustee, because it is incapable of succession. This objection is not valid; because it is not essential to the character of a trustee that he shall be able to serve forever. In all cases of charities the court have the power to substitute a trustee whenever that becomes necessary.² Upon an examination of the principles involved, the authorities cited, and the general rules applicable to the constitution of trustees, there appears to be no valid reasons why unincorporated societies for religious and charitable purposes may not hold as trustees for such purposes, either for their own benefit or for the benefit of others.³

¹ See at large *Magill v. Brown*, Zane's case, Brightly, 350; see *Potter v. Chapin*, 6 Paige, 639; *Dutch Church v. Mott*, 7 Paige, 77; *Zimmerman v. Anders*, 6 Watts & Serg., 218; *Am. B. Society v. Wetmore*, 17 Conn., 181; see *Voorhees v. Presb. Ch. of Amsterdam*, 8 Barb., 135; *Banks v. Phelan*, 4 Barb., 80; *Wright v. Trustees of M. E. Church*, Hoff., 202; *Shotwell v. Mott*, 2 Sandf. Ch., 46; *Newcomb v. St. Peters' Church*, 2 Sandf. Ch., 636; *Andrew v. N. Y. B. & P. B. Society*, 4 Seld., 559; but see *Owens v. M. So. of M. E. Ch.*, 4 Kern., 380; *Coggshall v. Trustees of New Rochelle*, 7 John. Ch. Rep., 292.

² *Vidal v. Girard*, 2 How. U. S., 127.

³ But see the reasoning of Selden, J., in the case of *Owens v. The Missionary Society of the Methodist Episcopal Church*, 14 N. Y. Rep., 380.

SECTION V. ALIENS AS TRUSTEES.

As the general rule of law is that any person may become a trustee who is capable of taking and holding the legal estate of that which is the subject of the trust, aliens may become trustees to the extent of such capacity.

The subject of alienage in the United States is a national subject, and is determined by national authority. The rule adopted for determining whether a person is an alien or a subject by birth, is the rule of the common law. All persons born within the jurisdiction and allegiance of the United States are natives, except the children of ambassadors who are, in theory, born within the allegiance of the foreign power they represent.¹ As the United States, as an independent government, had no existence until 1776, no one could owe it allegiance prior to that time: therefore those who had left the country prior to the revolution, without intending to return to it, did not become members of the new government, and therefore were aliens. But while the subject of alienage is national, the rights of aliens to take and hold property are determined by the laws of the several states where they reside, or where the property is situated.² An alien cannot acquire a title to real estate by descent, or in any other way created by mere operation of law, because the law, *quæ nihil frustra*, never casts the freehold upon one

¹ 2 Kent's Com., 1; *Lynch v. Clark*, 1 Sandf. Ch. R., 584, 639.

² *Lynch v. Clark*, 1 Sandf. Ch. R., 583.

who cannot keep it.¹ Upon the same principle an alien cannot take by dower or curtesy, because these are estates created by act of law.² And as an alien has no inheritable blood, a natural born subject cannot take by representation from an alien through whom the title must come. Thus, if a person die intestate without issue, and leave a brother who had been naturalized, and a nephew who had been naturalized but whose father died an alien, the brother succeeds to the whole estate, for the nephew is not permitted by the common law to trace his descent through his alien father.³ If an alien purchase land, or if land be devised to him, the general rule is, that in these cases he may take and hold until an inquest of office has been had; but upon his death the land would instantly, and of necessity, without any inquest of office, escheat and vest in the state, because he is incompetent to transmit by hereditary descent.⁴ In most of the states the capacity of aliens to take and hold real estate is determined by particular enactments. Thus, in North Carolina, an alien may take by purchase, but he

¹ *Jackson v. Lunn*, 3 Johns. Ch. Cas., 109; *Hunt v. Warnick*, Hard. Ken. R., 61.

² 2 Kent's Com., 16.

³ *Levy v. McCartie*, 6 Peters' U. S. R., 102; *Jackson v. Green*, 7 Wend., 333; *Jackson v. Fitzsimmons*, 10 Wend., 1; *Redpath v. Rich*, 3 Sandf., 79.

⁴ 2 Kent's Com., 54, and *Page's case*, 5 Co., 52; *Collingwood v. Pace*, 1 Sid. Rep., 193; 1 Lev. Rep., 59; *Jackson v. Lunn*, 3 John. Cas., 109; *Fox v. Southack*, 12 Mass., 143; *Fairfax v. Hunter*, 7 Cranch, 603, 619, 620; *Orr v. Hodgson*, 4 Wheat., 453; *Gouverneur v. Robertson*, 11 Wheat., 332; *Vaux v. Nesbet*, 1 McCord's S. C. Ch. Rep., 352, 374; 2 Dana's Kent. Rep., 40; *Rouche v. Williamson*, 3 Ired. N. C. R., 146.

cannot by devise.¹ So likewise in New York.² In Louisiana he can inherit real estate and transmit it *ab intestate*.³ In England it was formerly held that if an alien arrive there, and have two sons born there, and if one of them purchase land and die without issue, his brother cannot inherit as heir, because he must deduce his title by descent through his alien father who has no inheritable blood.⁴ But in *Collingwood v. Pace*,⁵ it was held by a majority of the court, that the sons of an alien could inherit to each other through an alien father.⁵ But still it was admitted that a grandson cannot inherit to his grandfather, though both were natural born subjects, provided the intermediate son was an alien. For the grandson must, in that case, represent his father who had no inheritable blood to be represented: while in the case of a brother inheriting to the other, the descent is immediate, and they do not take by representation from the father. These, says Chancellor Kent, are very subtle distinctions, and the reason is not readily perceived.⁶ These subtleties and over nice distinctions called for special enactments; accordingly the statute of 11 and 12 William III, chapter 6, was made for the purpose of "enabling natural born subjects to inherit the estate of their ancestors, either lineal or collateral, notwithstanding their father or mother, or

¹ 2 Hay. Rep., 37, 104, 108.

² N. Y. Rev. Stat., vol. 2, p. 57, sec. 4.

³ *Duke of Richmond v. Miln*, 17 Louis, 312.

⁴ Coke Litt., 8, note (a).

⁵ 1 Sid. Rep., 193.

⁶ 2 Kent's Com., 55.

ancestor, by, from, through, or under whom they might take or derive title, were aliens.”¹

Several of the states have enacted similar statutes: as Maryland, Kentucky, Ohio, Missouri, Delaware, New Jersey, New York and Massachusetts.² So likewise in Virginia, by statute, the course of descent is not interrupted by the alienage of any lineal or collateral ancestor;³ so also in North Carolina.⁴ But in those states where there are no statutory provisions to the contrary, the rule of the common law will prevail; though, says Chancellor Kent,⁵ the enlarged policy of the present day would naturally lead us to a benignant interpretation of the laws of descent, in favor of natural born citizens who were obliged to deduce a title to land from a pure and legitimate source, through an alien ancestor.⁵

It has already been stated that an alien may purchase land or take it by devise, where there is no statute to the contrary, but he is exposed to the danger of being divested of the fee, and of having his lands forfeited to the state, upon an inquest of office found. But his title will be good against every person except the state. At death, having no inheritable blood, his lands escheat to the state without inquest of office. If he sell his estate to a

¹ 2 Kent's Com., 55; *McCreary v. Somerville*, 9 Wheat., 354; *People v. Irvin*, 21 Wend., 128.

² 2 Kent's Com., 56; N. Y. Rev. Stat., vol. 1, 754, sec. 22; N. J. Rev. Stat., 1847, p. 341; 9 Wheat., 354; 2 Mass. R., 179, note; State Law Ohio, 1831; Elmer N. J. Dig., 131; Rev. Stat. Mo., 1835.

³ *Jackson v. Sanders*, 2 Leigh R., 109.

⁴ N. C. Rev. St., 1837.

⁵ 2 Com., 56.

citizen, the prerogative right of forfeiture is not barred, but the purchaser takes it subject to the right of the government.¹ In some of the states this prerogative right of seizing lands sold, *bona fide*, to citizens is abolished by statute.²

As the trustee is one in whom the legal title is vested, it follows that aliens are under the like disabilities as to uses and trusts arising out of real estate. An alien can be seised to the use of another to the same extent that he can be seised of the legal estate in the lands, and no further. Therefore, a use cannot be executed as against the state, and will be defeated on office found.³ This is the rule under the common law, and will be applicable where there are no statutory provisions to the contrary.⁴

As aliens are capable of acquiring, holding and transmitting movable property in like manner as citizens, they can become trustees of personal property to the same extent.⁵ An alien creditor may take a mortgage upon real estate by way of security for a debt, and, according to the decision of the Supreme Court of the United States in the case of *Hughs v. Edwards*,⁶ may come into a court of

¹ 2 Kent's Com., 61; see *Jackson v. Etz*, 5 Cow., 314.

² Griffith Law Register, tit. Virginia.

³ Gilbert on Uses, by Sug., 10, 367, 445.

⁴ As to the powers of aliens to hold real estate in New York, see 3d vol. Rev. Stat., 1859, pages 5, 6, 7 and 8; *Bradstreet v. Supervisors of Oneida*, 13 Wend., 546; *Ellice v. Win*, 12 Wend., 342; *Jackson v. Fitzsimmons*, 10 Wend., 9; *Jackson v. Smith*, 7 Wend., 367; *Jackson ex demise The People v. Etz*, 5 Cowen, 314. As to the rule applied, see *Jackson ex demise Gansevoort v. Lunn*, 3 J. C., 109, and *Orser v. Hoag*, 3 Hill, 79, and *People v. Conklin*, 2 Hill, 67.

⁵ 7 Co., 17; *Dyer's Rep.*, 2 b.

⁶ 9 Wheat., 489.

equity to have the mortgage foreclosed and the lands sold for the payment of the debt.¹ An alien enemy, resident in the country, is entitled to the same protection, in person and property, as in time of peace; and this right to protection is implied from being permitted to remain in the country.² So also if he is brought into the country as a prisoner of war, or is ordered to depart out of the country.³ Neither does an alien enemy in time of war lose his capacity other than an alien friend, unless by some special action of the government.³ So, likewise, an alien may hold as trustee of a corporation; and the rights of a corporation in its real estate are not affected by the alienage of its trustee.⁴ An alien may hold as executor.⁵ Naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture.⁶ The general principle is this: The lawful residence of an alien, *pro hac vice*, relieves him from the character of an enemy, and entitles his person and property to protection.⁷ During the residence of aliens with us, they owe a local allegiance, and are equally bound, with all natives, to obey all general laws for the maintenance of peace and the preservation of order, and which do not relate specially to our own citizens.⁸

¹ See preceding note.

² 2 Kent's Com., 63; *Clark v. Morey*, 10 Johns., 69.

³ *Bradwell v. Weeks*, 1 Johns. Ch. R., 208.

⁴ *Cammeyer v. The United Germ. Lutheran Church*, 2 Sandf. Ch., 186.

⁵ *Brook v. Phillips*, Cro. Eliz., 684.

⁶ *Jackson v. Beach*, 1 Johns. Ch., 402.

⁷ 2 Kent's Com., 63; *Wells v. Williams*, 1 Lord Ray., 282; *Clark v. Morey*, 10 Johns. Rep., 69.

⁸ 2 Kent's Com., 64.

SECTION VI. BANKRUPTS AND INSOLVENTS AS TRUSTEES.

It is well settled that trust property vested in a bankrupt does not pass to his assignee;¹ because the trustee holds only for the benefit of the *cestui que trust*, and the legal estate, therefore, should be subject to no incumbrances by the trustee for others than the beneficiary.¹ The legal estate in trust property, therefore, vested in the bankrupt or insolvent previously to bankruptcy or insolvency, remains unaffected until divested by legal transfer; and, therefore, such persons have not incurred any legal incapacity to prevent them from taking property, of any description, conveyed to them subsequently as trustees, and may hold as such, notwithstanding their bankruptcy or insolvency.² Upon the same principle, the liens of judgments against trustees will not attach to the trust estate. Neither are these estates liable, as against the trustees, for dower, curtesy, etc.²

SECTION VII. IDIOTS AND LUNATICS AS TRUSTEES.

As the legal estate can vest in idiots and lunatics, both by descent and purchase, they can come into

¹ *Carpenter v. Marnell*, 3 B. & P., 40; 1 Cruise Dig., tit. 12, chap. 4, § 1; *Copeman v. Gullant*, 1 P. Wm., 314; *Gardner v. Rowe*, 2 Sim. & Stu., 346; *Lounsbury v. Purdy*, 11 Barb. S. C. R., 490; *Ludwig v. Highley*, 5 Barr., 132; *Welhelm v. Folmer*, 6 Barr., 296; *Kip v. B'k of N. Y.*, 10 Johns., 63; *Blin v. Pierce*, 20 Verm., 25; *Ontario Bank v. Mumford*, 2 Barb. Ch., 596.

² Hill on Trustees, p. 51, and authorities cited.

the legal relation of trustees to *cestui que trusts*: but owing to mental incapacity, they cannot act; for they are incapable of giving a valid assent so as to bind themselves or their *cestuis que trust*.¹ Whenever a lunatic trustee is found in that relation, and action is required, he must act by committee, or under the direction of the court; and, if need be, the court will remove him and appoint a new trustee.

SECTION VIII. FEME COVERTS AS TRUSTEES.

The administration of a trust may properly be committed to any person who is capable of taking the legal title of the trust property, and has the capacity to exercise the necessary discretion in discharging the duties of the office of trustee. Thus, a *feme covert*, where her own interests or the interests of her husband are not concerned, has as much legal capacity as though she were perfectly *sui juris*.² For her discretion after marriage is no less than before; and Sir John Trevor thought she might probably improve by the instruction of her husband.³ Therefore, a married woman may be appointed trustee, where her own or her husband's interests are not concerned; although it is not usual, nor is it advisable to appoint her to such an office.

¹ *Loomis v. Spencer*, 2 Paige, 153; *Swartwout v. Burr*, 1 Barb., 495; *Person v. Warren*, 14 Barb., 488.

² Co. Lit. 112, note (a), also 187.

³ *Bell v. Hyde*, Pr. Ch., 330; *Lake v. De Lambert*, 4 Ves., 595; *Compton v. Collinson*, 2 Bro. C. C., 387; *Hearle v. Greenbank*, 1 Ves., 305; *L'd Antrim v. Duke of Buckingham*, 2 Freem., 168; *Godolphin v. Godolphin*, 1 Ves., 23.

SECTION IX. INFANTS AS TRUSTEES.

The legal objection to infants as trustees arises from their presumed lack of discretion. Owing to this want of judgment, the law will not permit them to bind themselves by their own contracts, except in certain necessary cases, for necessities, etc. Courts are exceeding jealous of the rights of infants, and are not disposed to extend the presumption of their legal capacity to bind themselves or charge their estates.

It is obvious that infants are not persons well adapted to fill the office of trustees.¹ The inconvenience of such an appointment for the execution of the office of trustee is such, that the court will not infer such an intention unless it is unequivocally expressed.

In the case of *Binion v. Stone*,² Sir George Binion bought a house for £2,000, in the name of his son, then five years of age. Sir George's estate being ordered to be sold for delinquency, the trustees for the sale sold it to Stone, to whom for £500, Sir George's son and wife conveyed, making oath they were not seised in trust for Sir George. Sir George sought relief against Stone as for a trust, when the estate was sold as that of Sir George's, and that the son was but five years old at the purchase. The court presumed it a trust, for which Sir George was

¹ *Blinkhorn v. Feast*, 2 Ves. Sen., 27.

² 2 Freem. R., 169.

relievable. Here the trust was presumed because of the tender age of the child.¹

In the case of *Lamplugh v. Lamplugh*,² where the father had purchased an estate in the name of his younger son, it was presumed to be an advancement, rather than make an infant a trustee. But this argument, *ab inconvenienti*, is never used unless the terms of conveyance, devise or bequest to an infant are so ambiguous as to leave it in doubt upon the face of the instrument whether they were intended to take as trustees or not. If such an appointment is actually made, the parties cannot, upon the strength of its singularity and its inconvenience or their own incompetence to act as trustees, set up a claim to the beneficial interest.³

¹ See note to *Lake v. De Lambert*, 4 Ves., 595.

² 1 P. Wm., 112; see *Matter of Windle*, 2 Edw., 585.

³ *King v. Denison*, 1 V. & B., 275; *Jevon v. Bush*, 1 Vern., 343; see note to *Lake v. De Lambert*, 4 Ves., 596.

CHAPTER II.

HOW TRUSTEES MAY BE CONSTITUTED.

SECTION I. BY AN EXPRESS APPOINTMENT OF
THE PARTY CREATING THE TRUST.

Trustees may be constituted by an express appointment to that office by the deed or will of the party creating the trust;¹ or under a power contained in such instrument;² or by a court of chancery or other court authorized by statute to exercise such power;³ or by an act of the legislature;⁴ or by implication or construction of law.⁵

Any instrument in writing sufficient to pass the legal title to property is competent to create a trust

¹ See Hill on Trustees, 62; Bacon's Uses, 355; Cruise Dig., tit. 12, chap. 1, sec. 4, etc.; 2 Bla. Com., 336.

² Bayley v. Mansell, 4 Madd., 226; 2 Sug. Pow., 533; Holder v. Durbin, 11 Beav., 594; Bowles v. Wicks, 14 Sim., 591; Oglander v. Oglander, 2 De G. & Sm., 381; Wilson v. Towle, 36 N. H., 129; see Cruger v. Halliday, 11 Paige, 314; Wright v. Delafield, 23 Barb., 498.

³ *In re Cooper's Settlement*, 39 Eng. L. & E. Rep., 103; Bowditch v. Banuelos, 1 Gray, 220; Bliss v. Bradford, ib., 407; Mitchell v. Pitney, 15 Geo., 319; Franklin v. Hayes, 2 Swan, (Ten.), 521; Montpelier v. East Montpelier, 29 Vt., 12; Leggett v. Hunter, 25 Barb., 81; Wilson v. Towle, 36 N. H., 129; Leggett v. Hunter, 19 N. Y., 445; People v. Norton, 5 Seld., 176.

⁴ The State v. Trustees of Vincennes University, 5 Ind., 77.

⁵ Hauff v. Howard, 3 Jones' Eq., 440; Martin v. Bank, 31 Ala., 115; Smith v. Strahan, 16 Texas, 314; People v. Houghtaling, 7 Cal., 348; Northcraft v. Martin, 28 Miss., 469; Fisher v. Fields, 10 Johns., 495; Howell v. Baker, 4 John. Ch., 118; Conger v. Ring, 11 Barb., 356.

and constitute a trustee. Consequently where an instrument operates as a valid disposition of property and contains a direction or declaration that the party taking under it shall hold for the benefit of another, such direction or declaration charges the conscience of the donee, and he takes the legal estate in trust for the beneficial owner. It is not necessary that the direction or declaration of the trust should be contained in the same instrument which vests the legal estate in the trustee.¹ But where there is an absolute conveyance by deed or other act, *inter vivos*, the instrument creating the trust must be made in contemplation of, or contemporaneously with, the conveyance.² For after the grantor has once divested himself of the legal title without making any declaration of trust, the grantee takes the beneficial, as well as the legal interest, and the power of the grantor to charge the property is at an end.³ By the statute 29, Car. 2, usually denominated the Statute of Frauds, it was enacted, "that all declarations or creation of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else shall be void;" and the substance of these

¹ *Addington v. Cann*, 3 Atk., 145, 151; *Inchiquin v. French*, 1 Cox, 1; *Wood v. Cox*, 2 M. & Cr., 684; *Johnson v. Clark*, 3 Rich. Eq., 305; *Smith v. Attersol*, 1 Russ., 266.

² *Crabb v. Crabb*, 1 M. & K., 511; *Kilpin v. Kilpin*, 1 M. & K., 520, 532.

³ *Addington v. Cann*, 3 Atk., 152; *Johnson v. Clarkson*, 3 Rich. Eq., 305; *Russel v. Jackson*, 10 Hare, 204.

provisions have been re-enacted in nearly all the States of the Union.¹ It should be observed that a distinction is to be made as to the requisites of the instrument necessary to pass the legal title to real estate, and that which fixes a trust upon it. Any instrument in writing, signed by the proper party at the proper time, will be sufficient to declare and fix the trust, and appoint the trustee, while there

¹ See note 2 in Hill on Trustees, p. 56. These sections have been re-enacted in words or in substance in nearly all the United States. Revised Statutes of Vermont, (1839,) chap. 66, sec. 22; Revised Statutes of Massachusetts, (1836,) chap. 59, sec. 30; *Dean v. Dean*, 6 Conn., 285; Revised Statutes of New Jersey, tit. 17, chap. 1, sec. 11; Pennsylvania, Act of 1856, Bright, *Purd. Supp.*, 1174; *Dorsey v. Clark*, 4 H. & J., 557; *McCubbin v. Cromwell*, 7 G. & J., 157; 1 *Dorsey's Laws*, 57; 2 *Cooper's Stat.*, S. Car., 401, 525; 2 *Cobb's Geo. Dig.*, 1128; *Elliott v. Armstrong*, 2 Blackf., 198; *Hovey v. Holcomb*, 11 Illinois R., 660; Revised Statutes of Arkansas, chapter 65, section 10; Revised Statutes of Missouri, chapter 68, section 3; Revised Statutes of Michigan, part 1, title 1; chapter 1. sec-27; Wisconsin Revised Statutes, page 164; *Thompson's Florida Digest* 178. In Maine, the Statute runs thus: "all trusts, except, &c., shall *be created* and manifested by some writing, &c.," Revised Statutes of 1847, chapter 92, section 31. Acc. Rev. Stat. New Hampshire, (1842.) chap. 130, sec. 13; Rev. Stat. of New York, 3d ed., part 2, chap. 7, tit. 1, sec. 6. The 7th section of the Statute of Frauds has been omitted in North Carolina, consequently trusts may be proved by parol; *Foy v. Foy*, 2 Hayw., 296. So, too, perhaps, in Tennessee; see *Caruther's & Nichols' Digest*, 350; *Meig's Digest*, 541; *Thompson v. Thompson*, 1 Yerg., 100; *McLanahan v. McLanahan*, 6 Hump., 99; *Haywood v. Ensley*, 8 Humph., 460. In Virginia, the section in question was omitted both in the earlier acts and in the Code of 1849, tit. 33, chap. 116, sec. 1; see *Bank v. Carrington*, 7 Leigh, 576. In Ohio it was ruled that before the Act of 1810, a trust in land might be proved by parol; *Flemming v. Donahoe*, 5 Ohio, 255; and that statute (1810,) does not apparently re-enact that section (7). But see *Star v. Star*, 1 Ohio, 329. In Pennsylvania, also, after some discussion, it has been settled that under the Act of 1779, trusts may be proved by parol. *Murphy v. Harbert*, 7 Barr., 420; *Tritt v. Crotzer*, 13 Penn. St. R., 451; *Wetherell v. Hamilton*, 15 Penn. St. R., 195; *Morey v. Herrick*, 18 Penn. St. R., 128; *Blyholder v. Gilson*, 18 Penn. St. R., 134. But by a recent statute of the state the law has been changed, and the provisions of the English statute adopted; Bright, *Purd. Sup.*, 1174.

are certain essential requisites of *form* and *substance* necessary to pass the title to such trustee. Indeed, by the construction put upon the words of the statute by the court, it is held that a trust of land may still be effectually *created* by parol, provided the existence of the trust be “manifested and proved” by written evidence. This, then, gives rise to a distinction between the *act* creating the trust, and the *written declaration* by which that *act* or *intent* is “*manifested and proved*,” because the creation of the trust might precede the making of the written declaration. This difference of time between the creation of the trust and making the written declaration thereof, has given rise to distinctions of considerable importance. The question to be considered was, whether the trust derived its existence so as to form a part of the disposable property of the *cestui que trust* from the time of its original creation, or from its written manifestation. If it only derived its legal existence from the written manifestation, then, up to that time, it would be liable for the acts and incumbrances of the ostensible owner.¹ But finally the courts have decided that the written declaration relates back to the time of the original creation of the trust, and so they give effect to all the intermediate acts of the *cestui qui trust*, and, thus,² defeat the rights which parties claiming under the trustee might have other-

¹ Hill on Trustees, 56.

² Ambrose v. Ambrose, 1 P. Wm., 322; Wilson v. Dent, 3 Sim., 385; Gardner v. Rowe, 2 S. & St., 346; S. C., 5 Ross, 258; but see Morgan v. Randall, 12 Ves., 74.

wise acquired, except as to *bona fide* purchasers, for a valuable consideration, without notice.

Inasmuch as a trustee is the "person in whom some estate, interest, or power in or affecting property, is vested for the benefit of another," and that estate, etc., is the *legal* estate, it follows that where the declaration of the trust and the appointment of the trustee are in the same instrument which vests the legal estate in the trustee—and such is usually the case—the trustee is constituted by such instrument, whether it be by deed or will. But inasmuch as it is not necessary that the conveyance of the legal estate to the trustee, and the creation of the trust, or constitution of the trustee, should be contained in the same instrument, the trustee may be constituted by any *other* instrument in writing, made in contemplation of, or contemporaneously with, such conveyance: provided the intention of the grantor or donor that the one taking the legal estate shall hold for the benefit of another, is clearly evinced in such instrument. So, likewise, the owner of property may convert himself into a trustee without transmuting the possession, by making a proper declaration of the trust in writing.¹ In examining these questions, it is proper to remember that the creation of the trust, the constitution of the trustee, and the conveyance of the estate to the trustee, may each be performed by different acts or instruments. Thus, the conveyance of the estate to the trustee

¹ Pinkett v. Wright, 2 Hare, 120; Meek v. Kettelwell, 1 Hare, 469; Suarez v. Pumpelly, 2 Sandf. Ch., 336.

may appear upon its face to be absolute, and the trust be created by another instrument, or by parol declaration.¹ Or the trust may be declared, and the trustee subsequently appointed. Thus it will be perceived that a trustee of real property may be constituted by any formal instrument, whether by deed or otherwise, which passes the legal title to the trust estate, provided it contains a proper declaration of the trust; or he may be constituted a trustee by any other instrument in writing, made in contemplation of, or contemporaneously with, such conveyance; or he may be constituted a trustee by parol.

It is hardly necessary to remark that a trustee of personal chattels may be constituted by any instrument in writing sufficiently evincive of such an intent; as well also by parol.

It has already been remarked, that by the construction which courts have given to the 7th sec. of 29 Car., 2, trusts of lands may still be effectually created by parol, provided the *evidence* by which it is to be "manifested and proved" be in writing, "signed by the party who in law is enabled to declare the trust;" therefore, written documents of any description evincive of such intention will satisfy the words of the statute.² But the objects

¹ Wood v. Cox, 2 M. & Cr., 684.

² Mereroft v. Dowding, 2 P. Wm., 314; Orleans v. Chatham, 2 Pick., 29; Hardin v. Bond, 6 Litt., 346; Graham v. Lambert, 5 Humph., 595; Gomez v. Tradesman's Bank, 4 Sand. S. C., 106; Blake v. Blake, 2 Bro. P. C., 250; Steere v. Steere, 5 J. C. R., 12; Raybold v. Raybold, 20 Penn. St., 308; Abeel v. Radcliff, 13 John. R., 297; Murry v. Glasse, 23 L. J. Ch., 126.

and nature of the trusts must appear from such documents with sufficient certainty, as well as their connection with the property in question.¹

Trusts are created and trustees constituted more frequently by will than by other instruments in writing; and it has been held that if the instrument containing such a declaration be too informal to be supported as a will, it might, if signed by the party, be sufficient evidence of the creation of the trust, to take it out of the Statute of Frauds.²

SECTION II. A TRUSTEE MAY BE CONSTITUTED BY AN APPOINTMENT UNDER A POWER CONTAINED IN THE INSTRUMENT CREATING THE TRUST.

Trusts, being in their nature matters of confidence reposed in the trustee, who is invested with the legal title and control of the trust property, must be executed by the person or persons to whom they are confided; consequently, the duties of the office of trustee cannot be delegated by him to another, unless the instrument creating the trust clearly confer such power upon him.³ The power to nominate new trustees is usually created by deed or will, and should be expressly conferred by such instruments. And the power should state with great particularity the cases or circumstances under which new trus-

¹ *Rutledge v. Smith*, 1 McCord Ch., 119; *Arms v. Ashley*, 4 Pick., 71; *Freeport v. Bartol*, 3 Greenl., 340.

² *Nab v. Nab*, 10 Mod., 404; but see *Johnson v. Ball*, 5 De G. & S., 85.

³ *Selden v. Vermilyea*, 3 Comst., 336; *Suarez v. Pumpelly*, 2 Sandf. Ch., 336; *Chalmers v. Bradley*, 1 J. & W., 68; *Wilkinson v. Parry*, 4 Russ., 272; *Adams v. Payuter*, 14 L. J. (N. S.) Ch., 54.

tees may be appointed, and by whom such appointments are to be made. Thus, it should state cases; as in case of death; or refusal to act; the refusal to accept; the absence from the country; the wish to retire; or, the future incapacity to serve or discharge the duties of the office, of any one or more of the trustees; then, the surviving trustee or trustees, or some other person named, with the consent of the surviving co-trustee to appoint a new trustee or trustees, etc. In this way, if great care is taken to provide for every possible contingency in which a change or new appointment may become necessary, much trouble and expense, and not unfrequently, great mischief may be avoided.¹

If there should be ambiguity in the power respecting the cases in which, the circumstances under which, or the persons by whom, the appointment is to be made, it would be unsafe to proceed without applying to a court of chancery for its order in the premises. For, should a trustee be appointed without such authority being contained in the instrument, as, the particular case not being provided for, or the appointment being made by the wrong person or at the wrong time, and should the trust property be conveyed to such trustee, although he would take the legal title or estate in the property, the office of trustee with all its responsibilities, would remain unchanged. The original trustee or trustees, if any such were remaining, would continue to be responsible to the *cestui que trust* for any misconduct or

¹ *Wilson v. Towle*, 36 N. H., 129; *Leggett v. Hunter*, 19 N. Y., 445.

breach of trust committed by the new party.¹ And the new trustee, so irregularly appointed, would not be authorized to exercise any of the powers pertaining to the office of trustee, in dealing with persons respecting the trust estate: but he would himself be liable as trustee *de son tort*, as would any stranger who should, of his own authority, enter into the possession of the property or assume the management of the trust.² The same will be the case if there be irregularity in the mode of exercising the power of appointment.² The principle involved is, that the power to appoint a new trustee can only be created by the author of the trust; and the power thus delegated must be exercised strictly according to the expressed intention of the one creating it.³ Thus, where the power provides that the surviving trustee, on the death, etc., of a co-trustee, is empowered to appoint a new one in his stead, it implies that the one making the appointment is acting as trustee, and, therefore, will not authorize those who refuse to act as trustees to appoint others in their stead.⁴ For the power is given to the trustee; and those who refuse to accept the office are not to be considered as trustees, and, therefore,

¹ *Chalmer v. Bradley*, 1 Jac. & Walk., 67; *Wilkinson v. Parry*, 4 Russ., 276; *Sharp v. Sharp*, Barn. & Ald., 405; *McAdam v. Logan*, 3 Bro. Ch. C., 310.

² See *Adams v. Paynter*, 14 L. J. N. S. Ch., 54; *Morris v. Preston*, 7 Ves., 547; *LaFort v. Delafield*, 3 Edw. Ch., 32; *McCoy v. Scott*, 2 Rawle, 222; *Goodhue v. Barnwell*, Rice's Eq., 198.

³ *Selden v. Vermilyea*, 3 Comst., 336.

⁴ *Sharp v. Sharp*, 2 Barn. & Al., 413; *McAdam v. Logan*, 3 Bro. Ch. Cas., 310.

not authorized to act under the power. Thus, also, where the settlement appointed two trustees, and provided "that if the said trustees, or either of them, should die, or become desirous of being discharged, or refuse or become incapable to act, the settlor, during his life, and, after his decease, the surviving or continuing trustee or trustees, or the executors or administrators of the last acting trustee, might appoint any other person or persons to be a trustee or trustees, in the stead of the trustee or trustees so dying, or desiring to be discharged, or refusing or becoming incapable to act; and upon every such appointment the trust premises should be so transferred that the same might become vested in the new trustee or trustees, jointly with the surviving or continuing trustee or trustees, or solely, as the case might require." The settlor died without appointing new trustees, and the two original trustees, being desirous of being discharged from the trust, afterwards appointed by the same deed, two other persons to be trustees in their stead. It was held not to be a valid appointment by the Master of the Rolls.¹ It was also held, in the case of *Sharp v. Sharp*,² that, where three distinct classes of trustees are appointed by name for as many distinct properties, and the power to appoint new trustees is expressed to take effect upon the death, etc., of any one of the first class of trustees by name, so far as applied to the trusts reposed in

¹ *Stones v. Rowton*, 17 Jurist, 750; 21 Eng. L. & Eq., 440; but see *Miller v. Briddon*, 18 L. J. Ch., 226; S. C., 1 De G. Mac. & G., 335.

² 2 Barn. & Al., 413.

them; or upon the death, etc., of any one of the second class of trustees by name, so far as applied to the trusts reposed in them; and there was no mention of the third class of trustees, the power did not apply to the last class of trustees, or the property vested in them as such; but that it was confined to those two classes which were expressly mentioned.¹

There has been a question whether a power which provides for the appointment of new trustees by the survivor, in case of the death, etc., of any of the original ones, would extend to the appointing of new trustees in the place of those who died during the life time of the testator.² Thus, in the case of *Walsh v. Gladstone*, three trustees were appointed by will, which provided that in case all or any of said trustees should die, etc., that it should be lawful for the surviving, continuing, or acting trustee or trustees, to appoint new trustees. Two of the trustees died in the testator's life time. It became unnecessary to decide this question; yet the vice-chancellor remarked that it appeared to him very questionable whether the survivor in such a case had the power to appoint new trustees.³ The same opinion was held in the case of *Winter v. Rudge*,³ where the will gave the power to the *cestui que trust* during her life time, and, after her death, to the then surviving or continuing trustee, to appoint any new trustee or trustees as often as any of the first

¹ See preceding note.

² 8 Jur., 51; 14 Sim., 2.

³ 15 Sim., 596.

or future trustees should die, etc.; and one of the trustees died in the testator's life time.¹ This doubt arose from the fact that the persons dying in the life time of the testator had never filled the character of trustees, so as to come within the terms of the power.² But this doubt is now settled the other way.³

The strictness with which courts adhere to the *intention* of the testator in their interpretation of these powers of appointment, is further illustrated in the case of *Attorney General v. Pearson*.⁴ In that case it was held by Lord Eldon, that a power in a deed of settlement of a dissenting chapel for the appointment of new trustees on the *desertion* or removal of any existing trustee, did not apply to a case where a trustee had left the trust, because it had been converted by the other trustee, to purposes distinct from the intention of its founder.⁴

Where the trust instrument provides that in case of the death, &c., of one of the trustees, the survivors, &c., shall appoint a new trustee, or trustees, and one of the trustees dies, and the survivor wishes to retire from the trust, it is improper for him to appoint his successor and the new trustee in the place of the one deceased, by the same deed: and if he do so, the appointment will be set aside.⁵ The

¹ See preceding note.

² Hill on Trustees, 178.

³ *Earl of Lonsdale v. Becket*, 19 L. J. Ch., 342; *Hadley's Trust*, 21 L. J. Ch., 109; 16 Jur., 98; 5 De G. & S., 67.

⁴ 3 Mer., 412.

⁵ *White v. Parker*, 1 Bing. N. C., 582; *Stones v. Rowton*, 17 Jur., 750; 21 Eng. L. & Eq., 440; but see *Miller v. Priddon*, 18 L. J. Ch., 226.

proper course to be pursued in such a case would seem to be, that the surviving trustee should appoint a successor to the one deceased; then the newly appointed trustee, by a subsequent deed, could appoint another in the place of the retiring one.¹ Under a power of appointment conditioned, among other things, upon a vacancy occurring by any of the trustees becoming "incapable" or "unfit" to act, it is held that there is a distinction between *incapacity* and *unfitness*. A bankrupt may be *unfit to act*, and yet be *capable* of acting; while another may be *fit to act*, and yet from circumstances, become *incapable of acting*. In the case of *Re Roche*,² Sir E. Sugden held, that the bankruptcy of a trustee rendered him *unfit to act*, so as to make an appointment valid, which was made in pursuance of power to appoint, conditioned on the trustee becoming *unfit*; whereas, in the case of *Re Watt's settlement*³ it was held, that a trustee who had become bankrupt and who had been indicted for not surrendering to the fiat, and had absconded, was not within the words "*incapable of acting*." That the words, "incapable to act," contemplated personal incapacity. So also in the case of *Withington v. Withington*,⁴ the Vice Chancellor held that a power in a will to appoint new trustees in case the trustees thereby appointed should become "*incapable of acting*," did not autho-

¹ Hill on Trustees, 179.

² 1 Conn. Laws, 306; *Shryock v. Waggoner*, 28 Penn. St., 430.

³ 15 Eng. Law & Eq., 67; 9 Hare, 106; 15 Jur., 459; 20 L. J. Ch., 337; *Wilson v. Wilson*, 6 Scott, 540; *Turner v. Maule*, 15 Jur., 761.

⁴ 16 Sim., 104; but see *Mennard v. Wilford*, 1 Sm. & Giff., 426; also see *Walker v. Brungard*, 13 Sm. & M., 724, 758.

alize the donee of the power to appoint a new trustee in the place of one who had gone to reside in China.¹ According to the principle that the power of appointing new trustees can be exercised only by those persons to whom the power is given, (and this rule is in analogy with the general rules that govern the laws affecting powers,) where the power is given to a particular office by name without any other words extending the power, or where it is given to several persons by name in the like manner, if the office cease, or one of the parties thus named die, the power will be gone. If, however, extending words are added, like those of "survivorship," or "executors," &c., or, if it appear that the power was given to them as a class of persons, as to my "trustees," "my sons," "my executors," omitting their proper names, the authority will survive while the plural number remains,² and in case of executors by a single survivor.³ Also where a power is given to a trustee, his *heirs*, *executors* and *administrators*, the power cannot be executed by a *devisee* or *assignee*,⁴ nor can it be exercised by any person or office not particularly specified.⁵

Mr. Sugden in his *Treatise on Powers*,⁶ remarks: "Mr. Hargrave has endeavored to establish that where the power is given to *executors*, or to persons *nominatim* in that character, the survivor may

¹ See preceding note.

² Hill on Trustees, 184.

³ 1 Sug. on Po., 244, (6th ed).

⁴ Bradford v. Belfield, 2 Sim., 264.

⁵ 1 Sug. Pow., 244; Houel v. Barnes, Cro. Car., 382.

⁶ 1 Sug. Pow., 146.

sell, as the power is given to them *ratione officii*, and as the office survives, by parity of reason, the authority should survive. And the liberality of modern times will probably induce the courts to hold, that in every case where the power is given to *executors*, as the office survives, so may the power.”¹

“As the law now stands, it seems,

“1. That when a power is given to two or more by their proper names, who are not made executors, it will not survive without express words.”

“2. That where it is given to three or more generally, as to ‘my trustees,’ ‘my sons,’ &c., and not by their proper names, the authority will survive whilst the plural number remains.”

“3. That where the authority is given to executors, and the will does not expressly point to a joint exercise of it, even a single survivor may execute it. But,”

“4. Where the authority is given to them *nominatim*, although in the character of executors, yet it is doubtful whether it will survive.”

“5. But where the power to executors to sell arises by implication, the power will equally arise to the survivor.”²

It is a general rule that the power of appointing new trustees will be confined strictly to those persons who answer the description in the will or deed.³ Therefore it cannot be exercised by the

¹ *Forbes v. Peacock*, 11 Mees. & Wels., 630.

² 1 Sug. Pow., 146.

³ *Cole v. Wade*, 16 Ves. Jr., 27; 1 Sugd. Pow., 148; *Bradford v. Belfield*, 2 Sim., 264; *Cafe v. Bent*, 3 Hare, 245.

heirs, or personal representatives of the trustee, or by his assignee, unless the authority be expressly limited to them.¹ This strictness, however, does not extend to the difference between a "surviving" and "continuing" trustee. Hence, the power given to a surviving trustee to appoint a new trustee, may be exercised by a continuing trustee.²

It is seldom that questions can arise as to the parties by whom the appointing power should be exercised, especially, where any care has been exercised in drawing up the power. It sometimes happens, however, that questions arise on the construction of these instruments which make it doubtful whether the surviving, continuing or retiring trustee shall make the appointment. On this subject Mr. Jarman³ makes the following observations: "On behalf of the surviving or continuing trustee, it may reasonably be urged, that he should have some share in the nomination of one who is to be his coadjutor in the trust. While on the other hand it does not seem quite right to enable him to fill the trust with his own nominees, as by so doing one of the objects of having a plurality of persons in the trust, namely that one should be a check upon the other, may be defeated, since the continuing trustee if he were dishonestly disposed, would select for his coadjutor one who would further his designs. Perhaps the best mode of meeting the difficulty is to give the power to both the retiring and continuing

¹ *Bradford v. Belfield*, 2 Sim., 264.

² *Eaton v. Smith*, 2 Beav., 236; *Lane v. Debenham*, 17 Jur., 1005.

³ 6 Jarm. Bythew. Convey., p. 506 and 507

trustee, or such of them as shall think proper to exercise it.”¹ In the case of *Stones v. Rowton*,² it was held that the words in the power, “the surviving or continuing trustee” should appoint, &c., did not extend to those trustees who resigned their trusts, and appointed others in their places; for such were neither surviving or continuing trustees.

Upon the principle of executing strictly the intention of the testator, where more trustees than one are originally appointed, the power as usually worded, does not authorize one of the trustees to retire, and without appointing another person in his place, to vest the entire property in his colleague as sole trustee.³ In the appointment of the original number of trustees, and by providing for keeping that number good, and then committing the trust to their management, the donor of the trust has signified what he deems to be essential for the proper security of it. Therefore, any exercise of the power thus given, by which the number of trustees would be diminished, would seem to be unauthorised and irregular.⁴ In pursuance of this principle, it has been held that the original number of trustees cannot be lessened, unless, from the wording of the power, some discretion of that kind is given to the donee of the power. In the case of *Hulme v. Hulme*,⁵ it was held that where, by the terms of the

¹ See preceding note.

² 17 Jur., 750, and 21 Eng. L. & Eq., 440.

³ *Wilkinson v. Parry*, 4 Russ., 274.

⁴ *Mass. Gen. Hospital v. Amory*, 12 Pick., 448; *Meinertzhagan v. Davis*, 1 Coll. Ch. R., 353; 8 Jur., 973.

⁵ *Mylne & Keen*, 682.

settlement, it appears to be the intention of the parties that there shall be at all times two trustees of the property comprised in the settlement, the appointment of a single trustee in the place of the two original trustees, and the transfer by them of the trust property to such single trustee, is a breach of trust for which the trustees are responsible. The same principle was held in the case of *Massachusetts General Hospital v. Amory*.¹ In that case two trustees were appointed by the testator; and the will provided that in case the trustees named, or either of them, should resign the trust or die before having fully performed and executed the same, "the judge of probate having jurisdiction of the will shall forthwith appoint one or more trustee or trustees in place of such trustee or trustees so failing." The trustees named accepted the trust, and one of them dying, the other resigned afterwards before the trust had been fully performed. It was held by the court that the appointment by the judge of probate of one person as sole trustee was not a compliance with the intent of the will, and that two trustees should have been appointed.¹ In *Green v. Borland*,² it was held that, under the statute of Massachusetts,³ where the testator devised property to two trustees and both declined the trust, and the will had made no provision for perpetuating the trust, that the probate judge, after notice to all the parties, and with the consent of the *cestuis que trust*,

¹ 12 Pick., 448.

² 4 Metcf., 332.

³ 1847, chap. 190, sec. 40.

could appoint a single trustee to execute the trust.¹ But this decision was under the statute, and was distinguished from the case of the *Hospital v. Amory*, above cited.

As it is the intention of the donor of the power which governs in these cases, if it can be gathered from the wording of the power that he did not intend to make the number of trustees imperative, or that he committed it to the discretion of the donee or donees, etc., then it is probable that the court would sanction the appointment of a less than the original number of trustees. Thus, where the exercise of the power of appointment is not imperative on the happening of every vacancy, but the survivors are permitted to proceed with the execution of the trust, this of itself, would prove that the donor of the power did not make the exact *number* essential to the proper execution of the trust; or where he provides that a certain number shall be a quorum to transact the business, etc.; in these and the like cases, it is conceived that some latitude would be allowed in the appointment of the exact number of the original trustees.² In the case of *Corrie v. Byrom*,³ a testator devised all his real estate to five trustees, and the survivors, and survivor of them, and the heirs and assigns of such survivor, in trust, to sell for the benefit of his chil-

¹ See preceding note.

² *Sands v. Nugee*, 8 Sime, 130; *in re Welch*, 3 M. & Cr., 293; Lewin on Trusts 465.

³ *In re Fagg's Trust*, 19 L. J. Ch., 175; *Pool v. Bathurst*, 2 Sm. & Giff., 169; *Buckley v. Earl of Eglinton*, 19 Jurist, 994.

dren and the issue of any deceased child, in such manner as his wife should appoint, etc. He also empowered the trustees or trustee, for the time being, to appoint any new trustees or trustee in case of the death or retirement, etc., of the existing trustees or trustee. His wife was one of the trustees, and all the trustees were appointed his executors. They all proved the will and accepted the trust. Three of them afterward, and at different times, died; and, upon the death of the third trustee, the two survivors appointed a new trustee jointly with themselves, and at the same time the trust estate was conveyed to the three jointly, upon the trusts of the will. Shortly after this, the two remaining *original* trustees died, leaving the newly appointed trustee sole trustee of the estate. He, then, appointed a new trustee in the place of the last deceased; and the newly appointed trustee, on the day following, by deed, reciting that his co-trustee wished to retire from the trust, appointed *three others* with himself in place of the retiring trustee and the original trustees; and the question arose, whether the power had been properly complied with so that these four trustees could make a valid conveyance of the trust estate, and it was so determined by the court. This case was tried before Vice-Chancellor Wigram, 26th April, 1845.¹

So far as this decision goes to establish the principle that an appointment of a *fewer* number of trustees than the original, where one of the trustees

¹ See preceding note; see *Belmont v. O'Brien*, 2 Kern., 394.

retires, is a valid exercise of the power, etc., it must be received with much caution; for the principle upon which the current of decisions on this point rests, cannot be overthrown; that is, that the intention of the donor of the power must be strictly followed; and unless it can be clearly gathered from the instrument that such discretion was committed to the donees, it would be unsafe to depart from the original number.

Upon the same principle of following strictly the intention of the donor of the power, it would be irregular to appoint a *greater* number of trustees than the original, unless the expressions in the power imply necessarily that the appointment of a greater number must have been in contemplation.¹ Wherever a greater number have been appointed and the appointment sustained, the appointment has been upon the principle, that there was a *discretion* committed to the donees of the power, or, that the increased number was in the contemplation of the donor of the power. Thus, in the case of *Sands v. Nugee*,² the estate was vested in *two* trustees, with the power for the appointment of any other persons to be trustees, providing that two trustees should be a *quorum*. This evidently implied that there might be more than two trustees, and such was the opinion of the court.² Keeping this principle in mind, it can seldom be difficult to determine whether, under

¹ *Meinartzhagen v. Davis*, 8 Jurist, 973; also 1 Coll. Ch. R., 335; *ex parte Davis*, 2 N. C. C., 468; *D'Almaine v. Anderson*, Lewin on Trusts, 465; *Sands v. Nugee*, 8 Sim., 130; *in re Welch*, 3 M. & Cr., 293.

² 8 Sim., 130; see *Stones v. Rowton*, 17 Jurist, 751.

the power, an increased number may be appointed. In case the power provides that when the trustees shall be reduced to a certain number by death, &c., that the surviving trustees shall appoint, &c., it has been decided that a less number cannot exercise the appointing power,¹ and therefore, when the surviving trustees are reduced below that number, the power of appointment is gone. This is upon the principle that the donor of the power has specified the least number to whom he is willing to commit the management of the trust, or the exercise of the power of appointment. It is only carrying out the principle before alluded to, that it is irregular to appoint a less number of trustees to manage the trust, than were originally appointed, unless it was clear from the instrument that such a discretion was given to the trustees or donees of the power. But it would not be irregular to exercise the power of appointment *before* the trustees were reduced to the specified number, because the greater number includes the less. Thus, where a deed of conveyance of a chapel to twenty-five trustees contained a clause directing, that when by death or otherwise, the number should be reduced to fifteen, then the remaining fifteen trustees, or a majority, should proceed to appoint or make up the number to twenty-five. But when the number was reduced to *seventeen*, twelve of that number elected eight new trustees, and five dissented. Lord Chief Baron Eyre held, that the appointment was within the scope of

¹ But see *Att. Gen. v. Bishop of Litchfield*, 5 Ves., 825; *Cafe v. Bent*, 9 Jur., 653.

the power, observing that the period of the trustees being reduced to fifteen was that at which they were compelable to fill up their number, not but what they might do it sooner.¹ But if the power, by its terms, makes it imperative that the vacancies occurring shall be filled immediately or at a particular time, or when they are reduced to a certain specified number, &c., such directions should be strictly complied with to avoid all questions which might arise.² Where the terms of the power are only *directory* or *advisory* as to the time and circumstances of appointing the new trustees, the court will not be strict in requiring compliance with the directions. Thus, in the case of Attorney General *v.* Floyer,³ the devise was to *six trustees* and their heirs, and when their number should be reduced to *three*, they should choose others. All the trustees except one, died, and he appointed others. The court held, that the time of filling these vacancies, &c., was only *directory*, and that the appointment by the sole survivor, was good.³ It is not safe, however, to neglect the directions of the donor of the power, as to the manner of filling these vacancies, for, as a general rule, all the formalities prescribed for making these appointments, must be strictly pursued.⁴

The author of the trust, who alone is capable of creating the power to appoint new trustees, may

¹ Doe d. Duplex *v.* Roe, 1 Anster, 86.

² Doe *v.* Roe, 1 Anst., 89; Folley *v.* Wantner, 2 J. & W., 245.

³ 2 Vern., 748; Att. Gen. *v.* Bishop of Litchfield, 5 Ves., 825; Doe d. Reid *v.* Godwin, 1 Dowl. & Ry., 259; Cafe *v.* Bent, 9 Jur., 653; also 5 Hare, 34.

⁴ See Sugden on P., 265, (6th ed.).

reserve to himself the exercise of such power to be exercised at discretion ; and such power will not be exhausted by one appointment, but may be exercised according to the reservation.¹ But in the case of *Planck v. Schemerhorn*,² where, in an assignment for the benefit of creditors, the assignor had reserved to himself the right to appoint new trustees on the resignation of the old ones, the court held that such power was interfering with the rights of creditors, and was therefore void.²

In framing these powers too much care cannot be expended in providing for every possible contingency which may make the appointment of new trustees necessary. Thus, a vacancy may occur during the life time of the testator ; therefore, the power should provide for vacancies occurring during the life time of the testator, or after his decease. The vacancy may occur either before or after the acceptance of the trust ; therefore, let the power provide that if the trustees hereby appointed, or any of them, or any future trustees or trustee hereof, shall die, etc., either before or after his or their acceptance of the trusts, etc. Some of the trustees may remove away ; may desire to be discharged ; may refuse to accept ; or, having accepted, may renounce the trust ; or they may become incapacitated from acting ; or may become unfit to act, etc. After having provided for every event which can render a new appointment necessary, the instrument should provide *by whom* the new appointment is to

¹ *Bodwitch v. Bannelos*, 1 Gray, 220 ; *Foster v. Goree*, 4 Alab.

² 3 Barb. Ch., 644 ; but see *Robins v. Embry*, 1 Sm. & M. Ch.

be made, in terms clear and unequivocal; and should specify the *time* and *manner* in which the same is to be made. It should also provide for vesting the new trustees with the necessary title to the trust property, and for the continuance in them of all necessary powers in a manner as full and perfect as those with which the original trustees had been vested. Care in framing these instruments will often save much perplexity and expense in the execution of the trusts. Mr. Hill, in his excellent work on trustees, has given a valuable form for a power of appointing new trustees of property settled upon the usual trusts in strict settlement.¹

Where the donees of a power to appoint new trustees neglect or refuse to exercise it when the occasion occurs, the remedy is by application to a court of equity, which will, on proper application, interpose, and make the appointment.² But this will be done only in cases of necessity, where the new appointment is actually necessary for the safety of the trust.³ And, where a discretion is given to the trustee in his power to nominate new trustees, the court will not interfere where he is acting in good faith.⁴ But it is his duty to make the appointments with due regard to the interests of the *cestuis que trust*, and, generally, on communication with them.⁵ And, where trustees have been brought

¹ Hill on Trustees, 3 Am. Ed., p. 268, note (1).

² Att. General v. Bishop of Litchfield, 5 Ves., 831.

³ *In re Marlborough School*, 7 Jur., 1047.

⁴ Hodgson's Settlement, 9 Hare, 118; also, 15 Jur., 552.

⁵ O'Riley v. Alderson, 8 Hare, 101; Marshall v. Sladden, 7 Hare, 428; 14 Jur., 106.

before the court, the court will exercise a control over the discretion in cases demanding it—not to destroy the discretion of the trustee; but to see that it is properly exercised.¹ And should the trustees, while before the court, exercise their power of appointing new trustees, such an act will not be, necessarily, a contempt, or void; but it must be shown, by the strictest evidence, that it was perfectly right and proper; and that, too, at their own expense.²

As to the manner of conveying the trust property to the newly appointed trustee, the following principles must be observed. The instrument of appointment will not of itself vest the legal estate in the trust property in the newly appointed trustee. Thus, a testator gave estates to four trustees, with powers and directions to appoint a new trustee within two months after a vacancy. They appointed a new trustee by deed, but the estate was not conveyed to him. It was held that such newly appointed person was not trustee, and that the old trustees alone could execute a power of sale.³ Therefore the appointment of a new trustee must be accompanied by a proper conveyance of the trust property to him, or to him and the surviving or continuing trustee or trustees jointly, &c.⁴

In case a single trustee only is required for the management of the trust estate, a conveyance or an

¹ *Webb v. Lord Shaftesbury*, 7 Ves., 487.

² *Att. Gen. v. Clarke*, 1 Beav., 467; *Middleton v. Reay*, 7 Hare, 106.

³ *Warburton v. Sandys*, 9 Jur., 441, 503; 14 Sim., 622.

⁴ *Folley v. Wontner*, 2 Jac. & W., 248.

assignment from the old to the newly appointed trustee will be sufficient to vest in him the legal estate, whether the property be leasehold or freehold estate. But where more than one trustee is requisite for the management of the estate, and the trust property consists of leaseholds or terms for years, being less than freeholds, and not within the statute of uses, the legal estate cannot be vested jointly in the continuing, surviving, and newly appointed trustees by one deed, as may be done where the estate is of freehold tenure. In such cases, the existing trustees assign the property to a stranger, who by the second deed, endorsed on the other, re-assigns to the old and new trustees jointly upon the original trusts.¹ But where the trust property consists of money or stock, the transfer may first be made, and then a deed declaring the trusts of the transfer be executed by the old and new trustees.¹

SECTION III. TRUSTEES APPOINTED BY THE COURT OF CHANCERY.

It is a well established principle in equity that a trust shall not fail for want of a trustee. In all cases, therefore, where a legal trust is clearly declared, and the subjects and objects thereof sufficiently defined, but no one is provided for executing the trust, or, having been provided, has failed, the court, on proper application, will appoint

¹ Hill on Trustees, 188; 6 Jarm. Byth. Conv., 524.

a trustee, or otherwise provide for its execution.¹ So also where the trustees that have been appointed have become incapacitated,² or are disqualified,³ or unfit to exercise the office,⁴ or for any other cause are deemed not to be proper persons to be entrusted therewith, the court, either on petition or by bill, if the proper parties are before them, will give the needed relief.⁵ Chancery has an inherent jurisdiction in those matters of trust or confidence of which the ordinary courts of law take no cognizance. Courts of equity consider the conscience of the party, entrusted with these confidences, bound to perform the trust; and, to prevent a failure of justice, they will interfere to compel its performance.⁶ And, upon the same principle, the court will extend its aid and protection to the trustee, whenever it is sought, for the establishment, management, or execution of the trust.⁶

¹ *Wood v. Stane*, 8 Price, 613; *Buchanan v. Hamilton*, 5 Ves., 722; *Hibbard v. Lamb*, Ambl., 309; *Finley v. Howard*, Dru. & War., 490; *in re Ledwich*, 6 Ired. Eq. Rep., 561; *Wilson v. Towle*, 36 N. H., 129; *Matter of Mechanic's Bank*, 2 Barb. S. C., 446; *De Peyster v. Clendining*, 8 Paige, 295; *Potts' Petition*, 1 Ashm., 340; *Lee v. Randolph*, 2 Hen. & Munf., 12; *Pate v. McClure*, 4 Rand., 164.

² As where the trustee becomes a lunatic: *Matter of Wadsworth*, 2 Barb. Ch., 381; or goes abroad to reside permanently, *O'Riley v. Alderson*, 8 Hare, 101; or by habits of intemperance has become imbecile, *Bayles v. Staats*, 1 Halst. Ch., 513.

³ Or becomes a habitual drunkard: *Fisk v. Stubbs*, 30 Alab., 335; or a *feme sole* trustee marries, *Lake v. De Lambert*, 4 Ves., 592.

⁴ As a bankrupt: *Bainbridge v. Blair*, 1 Beav., 495; or having been guilty of breaches of trust, *Parsons v. Winslow*, 6 Mass., 169; *Cooper v. Day*, 1 Rich. Eq., 26.

⁵ *Mayor of Coventry v. Att. Gen.*, 7 Bro. P. Cas., 235; *Buckridge v. Glasse*, Cr. & Ph., 126; *ex parte Phelps*, 9 Mod., 357; *ex parte Reynolds*, 5 Ves., 707.

⁶ *Story's Eq.*, sec. 961; *Mif. Eq. Pl. by Jeremy*, 4 and 133; 2 *Sug. Pow.*, 532, (6th ed); *Ellig v. Naglee*, 9 Cal., 683; 2 *Rich. Eq.*, 134.

This jurisdiction also exists, and, in proper cases, courts will exercise it, whether the instrument creating the trust does or does not contain a power to appoint new trustees. In the case of *Webb v. Earl of Shaftsbury*,¹ Sir John Webb had, by will, devised his several parcels of real estate in Gloucester, Dorset, Lincolnshire, etc., to Edward Arrowsmith, his heirs and assigns, upon certain trusts therein declared; also his personal estate, upon the like trusts. He also gave to Arrowsmith, for his own use, as a satisfaction for his trouble in the execution of the trusts of the will, five per cent. per annum upon the amount of the gross annual rents and profits of his real estate, etc. The will then proceeds thus: "I do hereby authorize and empower the said Edward Arrowsmith, at any time during his life, by any deed or instrument under his hand and seal, to nominate and appoint one or more person or persons to be a trustee or trustees for all or any part of the purposes and trusts in this my will contained: and who shall act in all things as fully and effectually as the said Edward Arrowsmith; and he and they shall, upon the death of the said Edward Arrowsmith, be entitled to the same commission which I have given to him; and when such new trustee or trustees shall be so nominated and appointed as aforesaid, I direct the said Edward Arrowsmith to convey, assure, assign and transfer all my real and personal estate into the names of himself and such new trustee or

¹ 7 Ves., 480; *Suarez v. Pumpelly*, 2 Sand. Ch., 336; *Chambers v. Mauldin*, 4 Alab., 477; *Webb v. Earl of Shaftsbury*, 7 Ves., 480; *in re Cooper's Settlement*, 39 Eng. L. & Eq., 103.

trustees." He also appointed Arrowsmith and the mother of his said children their guardians, and appointed Arrowsmith sole executör. The first bill was filed to have the will established, which was done by a decree directing the accounts; and, among other things, that Arrowsmith should let and set with the approbation of the master. The second bill was filed by the heir-at-law. Under the first bill exceptions were taken by Arrowsmith for disallowing several claims. Arrowsmith claimed £168 as due from the testator at the time of his decease, upon the balance of an unsettled account for money laid out by him for the testator, etc.; and also for certain sums expended upon the Gloucestershire estate for gamekeeper's and steward's wages, and for powder, shot and dogs.

The cause came on upon the exceptions and for further directions; and upon a motion that the defendant, Arrowsmith, might be restrained from executing a conveyance to a new trustee.

Lord Eldon (Chancellor), remarked, "The defendant appears to me to have no interest whatsoever in the act of appointing a new trustee. If it stands upon this clause alone, he has no other discretion with regard to the appointment of a new trustee than trustees in ordinary cases. It is true, he can, by the appointment of a trustee, convey a much more extensive interest, than a trustee appointing a new one in general cases can. But that circumstance does not at all affect the control of the court over his discretion, though it imposes upon the court a duty more especially to take care that

its own discretion is wisely exercised; for where such a remuneration is given to the new trustee as Mr. Arrowsmith can give, no one motive ought to operate upon him in the appointment, but to do the very best thing, not for himself or the person whom he is to appoint, but for those whose interests they are to take care of; there is no doubt therefore of the control of the court over his discretion. It does not prevent the exercise of his discretion; but it takes care that it shall be duly exercised. In ordinary cases, trustees, parties to the suit, will not be allowed to change the trustees without the authority of the court. There is no doubt the court will restrain; and it is not a sufficient answer that the court will take care to prevent the consequences; for the mischief is in a great measure done by the appointment, the necessity of getting back the legal estate. It is enough to say, the court does not permit the discretion to be exercised except under the direction of the court. The defendant, therefore, if he wants to appoint a new trustee, must go before the master, and propose a person; and, therefore, ought to be restrained from appointing a new trustee without an application to the court.¹

In the case of the Attorney General *v.* Clark,² there was a charity to be administered by eight persons as trustees, and when these eight persons were reduced to four, the remaining four were to appoint eight other trustees. About the middle of the year 1835, there were four remaining trustees,

¹ 7 Ves., 480; *Devey v. Pace*, 1 Tamyl., 77.

² 1 Beav., 468.

and one of the remaining four, having been affected by paralysis which injured somewhat his mind, the remaining three were in doubt whether they ought to apply to the court for the purpose of having its assistance in the appointment of the new trustees. There were also certain demands against the charity which required the action of the trustees. Under this state of things an information was filed asking that new trustees might be appointed, that the lien claimed (if there were any lien), might be satisfied, and that the outstanding property belonging to the charity might be got in. After the information was filed, the trustees, without seeking the assistance of the court, proceeded to appoint new trustees, and to settle the other matters. The Master of the Rolls held that their act was neither a contempt of court, nor one altogether void; yet the act on the part of the trustees, under the circumstances, was highly improper, and imposed upon them the necessity of proving by the strictest evidence, and at their own expense, that what had been done was perfectly right and proper. And such not appearing to be the case in this instance, their appointments were set aside, and they were ordered personally to pay the extra costs occasioned by their improper action. In stating this case the Master remarked that in cases of charity the court had a right to interfere in matters of discretion, even where assistance was not needed in aid of right.¹

In the case of *Finlay v. Howard*,² £5,000, by

¹ See preceding note.

² 2 Dru. & War.. 490.

deed of settlement, executed on the marriage of Frederick Howard and Catherine his wife, which sum was the lady's fortune, was vested in Government stocks, in the joint names of James McEvoy and Luke Plunket, upon the following trust: to pay the dividends thereof to said Frederick and Catherine; and from and after the death of the survivor, in case there should be issue an only child, to pay and transfer said sum to such only child or the issue of such child, at such age and time as the said Frederick and Catherine, or the survivor of them, should appoint. The settlement also contained a power of advancement, and a power to appoint new trustees in case of the death, &c., of either of the original trustees, upon the nomination of the said Frederick and Catherine. There was only one child issue of this marriage, and she intermarried with Sir Thomas Finlay. At this marriage, £1,000, part and parcel of the 5,000*l.*, was appointed by said Frederick and Catherine, to their daughter, &c., and paid over to her husband, Sir Thomas. A bill was filed by Finlay and wife, setting forth their claim on the death of said Howard and wife, whenever it should occur; also the death of McEvoy, one of the trustees, and their right to have a new trustee appointed; that, fifteen days previous to filing the bill, they had notified Howard to nominate a new trustee within a week, and praying a reference to the master to appoint a new trustee. The Lord Chancellor held, that the principle involved in the application was correct, and it was referred to the master to approve a fit and proper person to be appointed a trustee in

the stead of McEvoy, deceased; and it was further ordered, that the surviving trustee, Luke Plunket, should make the necessary transfers, &c.¹

In the case of *Millard v. Eyre*,² a testator had directed that if either of the trustees should die or become incapable of acting, that new trustees should be appointed. One of the trustees absconded under charge of having committed several forgeries. A bill was filed for the purpose of having a trustee appointed in his stead. There was no opposition, and the other trustee preferred to take the opinion of the court, &c. The Lord Chancellor referred it to the master to appoint a new trustee.²

In *Buchanan v. Hamilton*,³ one of three trustees, under an act of Parliament which made no provision for a change of trustees, went abroad and released to the other two. Upon a bill filed, it was referred to a master to appoint a new trustee. Thus, as a general principle, in all cases where vacancies occur in the board of trustees and no suitable provisions exist for supplying such vacancies, the court will, on proper application, interfere for the protection and execution of the trust, and fill such vacancies. Thus, courts have exercised their inherent jurisdiction over trusts to appoint trustees in a very great variety of cases, as, where vacancies have been occasioned by the death of any existing trustee;⁴ or where no person could be found answer-

¹ See preceding note.

² 2 Ves., 94; *Buchanan v. Hamilton*, 5 Ves., 722.

³ 5 Ves., 722.

⁴ *Hibbard v. Lamb*, Amb., 309; *Hewitt v. Hewitt*, Amb., 508; *State Bank v. Smith*, 6 Alab., 75; *Pate v. McClure*, 4 Rand., 164.

ing the description of the trustee in the instrument creating the trust;¹ or where the trustees were desirous of being discharged;² or where they declined to act;³ or where they had absconded;⁴ or were incapable of acting;⁵ or where a trustee has been guilty of a breach of trust,⁶ or where the trustee had become bankrupt.⁷ In making appointments in these and the like cases, the court are governed by what to them seems needful and proper for the establishment, management and execution, of the trust. Thus, in the case of *Attorney General v. The Mayor, etc., of the city of London*.⁸ The College of William and Mary, in Virginia, had been entrusted with the application of certain charitable funds, called "The Charity of the Honorable Robert Boyle, Esq., of London, deceased." But by the American Revolution and the Independence of the American States, the College became subject to a foreign power, and therefore the Lord Chancellor held that a new scheme must be submitted for the administration of the charity. So also in the case

¹ *Att. Gen. v. Stephens*, 3 M. & K., 347.

² *Howard v. Rhodes*, 1 Keen, 581; *Coventry v. Coventry*, 1 Keen, 758; *De Peyster v. Clendining*, 8 Paige, 296.

³ *Miles v. Neave*, 1 Cox, 159; *King v. Donnelly*, 5 Paige, 46; *De Peyster v. Clendining*, *ut supra*; *matter of Mechanic's Bank*, 2 Barb. S. C., 446; *Lee v. Randolph*, 2 Hen. & Munf., 123.

⁴ *Millard v. Eyre*, *ut supra*.

⁵ *Bennet v. Honeywood*, AmbL., 710; *Suarez v. Pumpelly*, 2 Sandf. Ch., 336; *Bayles v. Staute*, 1 Halst. Ch., 513.

⁶ *Att. Gen. v. Shore*, 7 Sim., 290; *Parsons v. Winslow*, 6 Mass., 361; *Cooper v. Day*, 1 Rich. Eq., 26; *Gibbs v. Smith*, 2 Rich. Eq., 131.

⁷ *Bainbridge v. Blair*, 1 Beav., 495.

⁸ 3 Bro. Ch. R., 171.

of *Lake v. De Lambert*.¹ The court discharged a woman from the office of trustee who had married a foreigner, although she purposed to continue within the jurisdiction of the court, and still desired to continue in the office of trustee. The Chancellor simply remarked, "that it was very inconvenient for a married woman to be a trustee." By this, however, it is not to be inferred that a married woman may not be a trustee. The argument, *ab inconvenienti*, is not to be used unless the terms of the conveyance, devise or bequest to an *infant* or *feme covert* are so ambiguous as to leave it in doubt upon the face of the instrument whether they were to take as trustees or not.² So, also, when the trustee omitted to enter into the proper security when the act required it,³ or where the trustees show a disposition to violate the duties of their trust so as to endanger the trust property.⁴ An examination of a few of these cases will show the nature of the jurisdiction courts of equity exercise over these matters of trusts. They will endeavor to do whatever needs to be done, to carry out the legal intention of the author of the trust, when that intention can be definitely ascertained.

In the case of *De Peyster v. Clendining*,⁵ all the

¹ 4 Ves., 592.

² *King v. Denison*, 1 V. & B., 275; *Jevon v. Bush*, 1 Vern., 343.

³ *Johnson's Appl.*, 9 Barr., 416.

⁴ *Harper v. Straws*, 14 B. Monr., 57.

⁵ 8 Paige, 310; see 1 R. S. of N. Y., 730, sec. 70, 71; *King v. Donnelly*, 5 Paige R., 46; *Matter of Mechanics' Bank*, 2 Barb. S. C., 446; *McCorkin v. Bond*, 1 Barb. Ch., 329; *Pott's Petition*, 1 Ashm., 340; *Lee v. Randolph*, 2 Hen. & Mumf., 12; *Dawson v. Dawson*, *Rice's Eq.*, 243; *Field v. Arrow-smith*, 3 Humph., 442.

trustees named in the will refused to accept the trust, and renounced before the surrogate, and the will had made no provision for the appointment of new trustees. The Chancellor remarked, "that this court will not permit a devise in trust, which is valid in other respects, to fail for want of a trustee. And if the administrator with the will annexed is not substituted in the place of the trustees who have declined, the trust devolves upon the court, and the decree must direct the appointment of a new trustee," etc., to execute the powers in trust.¹

In the case of *Bayles v. Staats*,² Isaac Staats and John Frelinghuysen were appointed executors and trustees for the management of certain trust funds. Frelinghuysen died, leaving Staats surviving executor and sole trustee. Staats was a common drunkard. The *cestui que trust*, by her next friend, filed a bill setting forth the facts and stating that the said Isaac Staats, owing to confirmed habits of intemperance and consequent imbecility of judgment, had become entirely unfit to execute the trust, etc.; and that at times he threatened to realize the securities and apply the moneys thence arising to his own use. That he had already instituted a suit on one of the notes constituting a part of the funds invested for the benefit of the complainant, etc. The bill prayed that a fit and competent person might be appointed in the place of the said Staats, to take charge of and execute the trusts, etc. The Chancellor, on hearing

¹ See the N. Y. Rev. Stat., vol. 3, p. 22, § 70.

² 1 Halst. Ch., 513.

the evidence, etc., ordered a new trustee to be appointed in the place of Staats; an account to be taken, and the trust fund to be delivered over to the new trustee.¹

Also, in the matter of Wadsworth,² a trustee who had become lunatic, was removed, and a new trustee was appointed in his place, in order that the trusts of the will might be executed.

In the case of Cooper and wife *v.* Day,³ it was held that where a trustee raised a grossly unreasonable claim to the trust property, in open defiance of his *cestuis que trust*, and in direct violation of his obligations, he was guilty of such misconduct as authorized his removal from the office of trustee.

Also in the case of Gibbs *v.* Smith,⁴ while the court refused to remove the trustee upon the case made, as the court was not satisfied that the trustee had not acted judiciously in the premises, it remarked "To remove a trustee without his consent, is an undoubted power of this court." As was justly remarked by Lord Hardwick on one occasion: "A trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, and it is an act of great kindness in any one to accept of it. If there is no *mala fides*, nothing wilful in the conduct of the trustee, the court regards his acts with a favorable eye." Courts

¹ See preceding note.

² 2 Barb. Ch., 384; see *in re Smith*, 17 L. J. Ch., 415.

³ 1 Rich. Eq., 26.

⁴ 2 Rich. Eq., 134; *Clemens v. Cadwell*, 7 B. Monr., 171.

have also exercised their power to remove trustees and appoint others in cases where they could not discharge the trust committed to them, through disagreement among themselves.¹ So also when the trustee had become bankrupt and thereby deemed unfit to act.² In the case of *Turner v. Maule*³ one of the trustees had become a bankrupt and absconded. The deed of settlement contained a power authorizing Mr. Turner, the settlor, to appoint new trustees in case either of the said trustees thereby appointed should die, or desire to be discharged from, or refuse, or become incapable to act in the trusts thereby declared. Mr. Turner being in doubt as to his authority to appoint in this case, by petition came before the court for its advice and assistance, No one had been served with the petition, but it was stated by the counsel that the parties were willing to proceed with the appointment of a new trustee, a gentleman agreed upon among them as a fit person, if the court would sanction such a course. The V. C., Knight Bruce, thought the terms of the power were not sufficient to authorize such a course to be taken. He said it was possible the bankrupt might come back. The court was not authorized to act in virtue of its inherent jurisdiction for the proper parties were not before it.

The power of the Court of Chancery over trusts and trustees in cases pertaining to the establishment,

¹ *Bagot v. Bagot*, 10 Law Jour. N. S. Ch., 116; *Unvedale v. Patrick*, 2 Ch. Cas., 20.

² *Bainbridge v. Blair*, 1 Beav., 495.

³ 5 Eng. L. & Eq., 222; 15 Jur., 761.

management and execution of the trust, would seem to be equal to any emergency which might arise, where the court could be sufficiently informed upon the subject to give the needed relief.¹ But in order to make its powers ample, and render a doubtful jurisdiction certain, legislation has been resorted to from time to time, declaring more plainly, or enlarging its general jurisdiction. Thus, in England, acts of Parliament have been passed by which the power of appointing new trustees in certain cases is expressly given to the court to be exercised in a more concise and summary way than under the common law practice. Thus, the general bankrupt act² provides, that if any bankrupt shall as trustee be seised or possessed of, or entitled to, either alone or jointly, any real or personal estate or any interest secured thereon, or arising out of the same, or shall have standing in his name as trustee, either alone or jointly any government or other stock in England, Scotland or Ireland, it shall be lawful for the Lord Chancellor, on the petition of the persons entitled in possession to the receipt of the rents, etc., and on due notice to all other persons interested, to order the assignees, and all persons whose act or consent thereto is necessary to convey, assign or transfer the said estate, interest, stock, etc., to such person or persons as the Lord Chancellor shall think fit upon the same trusts as the said estate, etc., was subject to before

¹ See *Leggett v. Hunter*, 19 N. Y., 445; *Fisk v. Stubbs*, 30 Alab., 335; *Buel v. Hiler*, 3 Dutcher, 43; *People v. Norton*, 5 Seld., 176; see *Wilson v. Pennock*, 27 Penn. St., 238.

² 6 Geo. IV., chap. 16, sec. 79.

bankruptcy, or such of them as shall then be subsisting and capable of taking effect, and also to receive and pay over the rents, etc., as the Lord Chancellor shall direct. Subsequently, by the Bankruptcy Court act,¹ this as well as the other jurisdiction of the Lord Chancellor in matters of bankruptcy is transferred to the Court of Review, subject to the right of appeal to the Lord Chancellor.¹ So, also, the Statute of 11 George IV, and 1 William IV, c. 60, provides, that where trustees are persons *non compotes mentes*, or infants, or out of the jurisdiction, or where it is unknown who is the survivor of several trustees, or whether he is living or dead; or who is the heir; or where any trustee, or heir, or executor of any last surviving trustee, refuses or neglects to convey, assign, surrender or transfer the trust property when required to do so as directed by the act, it shall be lawful for the Lord Chancellor, on petition, to direct a conveyance, etc., to be made by the trustee himself, or by any person whom the court shall appoint in his place. By the 22d section of the act, after reciting that cases may occur upon application by petition under the act for a conveyance or transfer, where the recent creation or declaration of the trust or other circumstances may render it safe and expedient for the Lord Chancellor, etc., to direct by an order on such petition, a conveyance or transfer to be made to a new trustee or trustees, without compelling the parties seeking such an ap-

¹ 1 and 2 Wm. IV., chap. 56, sec. 2; Hill on Trustees, 192; Archb. Bankr. Law, 9th ed., 248.

pointment to file a bill for that purpose, although there is no power in any deed or instrument creating or declaring the trust of such land or stock to appoint new trustees; it is enacted that in any such case it shall be lawful for the Lord Chancellor, etc., to appoint any person to be a new trustee, by an order to be made on a petition for a conveyance or transfer under the act after hearing all such parties as the court shall think necessary; and thereupon a conveyance or transfer shall be executed so as to vest such land or stock in such new trustee, either alone or jointly with any surviving or continuing trustee, as effectually, and in the same manner, as if such new trustee had been appointed under a power in any instrument creating or declaring the trust of such land or stock, or in a suit regularly instituted.¹

It has been decided that the jurisdiction conferred on the court by the provisions of the 22d section above recited, applies only to cases pointed out by the previous sections: and that in all cases not coming clearly within those provisions, a bill must be regularly filed for the appointment of trustees, under the general jurisdiction of the court.²

By the Banruptcy Consolidation act, 12 and 13 Victoria, c. 106, the jurisdiction of the Court of Bankruptcy in the appointment of trustees is transferred to the Court of Chancery.³

NEW YORK.—The authority of the court of chan-

¹ Hill on Trustees, 193.

² Hill on Trustees, 193; Re Nichols Ca. Temp. Sugd., 17; Re Fitzgerald, id., 20; Re Rennefather, 2 Dr. & W., 292; Re Hartford, id.

³ *Ex parte* Walker, L. J. Bmk., 37.

cery to remove and appoint trustees has been regulated by statute in many of the states. By the statutes of New York¹ it is provided that "upon the death of the surviving trustee of an express trust, the trust estate shall not descend to his heirs, nor pass to his personal representatives; but the trust if then unexecuted, shall vest in the Supreme Court, (by a former act, the Court of Chancery) with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose, under the direction of the court."¹ That "upon the petition of any trustee, the Supreme Court (formerly Court of Chancery), may accept his resignation and discharge him from the trust, under such regulations as shall be established by the court for that purpose, and upon such terms as the rights and interests of the persons interested in the execution of the trust may require."² "Upon the petition or bill of any person interested in the execution of a trust, and under such regulation as for that purpose shall be established, the Supreme Court (formerly Court of Chancery), may remove any trustee, who shall have violated or threatened to violate his trust, or who shall be insolvent, or whose insolvency shall be apprehended, or who for any other cause shall be deemed an unsuitable person to execute the trust."³ The Supreme Court (for-

¹ Fifth edition of N. Y. Rev. Stat., title 2, art. 2, sec. 87, (68); 3d vol., p. 22; *Hawley v. Ross*, 7 Paige, 103; *McCosker v. Brady*, 1 Barb. Ch., 329; *People v. Norton*, 5 Seld., 176.

² N. Y. Rev. Stat., *ut supra*, sec. 88, (69). In *Matter of Stevenson*, 3 Paige, 420; *Legget v. Hunter*, 25 Barb., 81.

³ Sec. 89, (70).

merly Chancellor), shall have full power to appoint a new trustee in place of a trustee resigned or removed; and when in consequence of such resignation or removal, there shall be no acting trustee, the court in its discretion may appoint new trustees, or cause the trust to be executed by one of its officers under its direction.¹ By the 91st section of this act, it is provided that sections 88, 89 and 90, extend only to cases of express trusts.² The express trusts authorized by the N. Y. Revised Statutes, are, 1. To sell lands for the benefit of creditors; 2. To sell, mortgage or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon; 3. To receive the rents and profits of lands, and apply them to the use of any person during the life of such person, or for any shorter term, subject to the rules prescribed in the first article of this title (as amended, 1830, ch. 320, § 10); 4. To receive the rents and profits of lands and to accumulate the same for the purposes, and within the limits prescribed in the first article of this title. The authority of the court to appoint trustees under the provisions of this act, is somewhat strictly construed. Thus, in the matter of Van Schoonhoven:³ Maria Schuyler, who died in 1832, by her will

¹ Sec. 90.

² As to who are held to be trustees of an express trust under the statute, see *Grinnel v. Schmidt*, 3 Code Rep., 19; 2 Sand., 706; *Bogart v. O'Regan*, 1 E. D. Smith, 590; *Minturn v. Main*, 3 Selden, 224; *Morgan v. Reid*, 7 Abb., 215; *Rowland v. Phelen*, 1 Bosw., 43; *Burbank v. Beach*, 15 Barb., 326; *People v. Norton*, 5 Selden, 176; Act 1840, chap. 318, pp. 267.

³ 5 Paige, 559.

appointed three trustees of her estate, upon certain trusts therein specified; two of the trustees accepted; one refused, and, by formal instrument, renounced the execution and acceptance of the trust. Subsequently, one of the two accepting trustees died. A petition was presented, setting forth the facts, and that the surviving trustee and persons principally interested desire the renouncing trustee, by the order and appointment of the court, may be reinstated as trustee under the will, with all such powers and responsibilities as he would have originally possessed and assumed under the will, if he had not renounced the trust. The Chancellor held that the court had no power or authority to restore the renouncing trustee, or to appoint him a trustee, so long as one of the trustees who originally accepted the trust, continued to act as such trustee. The power which is given to this court to appoint new trustees of an express trust, by the provisions of the Revised Statutes, extends only to the appointment of a new trustee where the only surviving trustee happens to die, so that there is no one left to execute the trust. That the 71st section of the statute only authorized the court to appoint a new trustee in the place of one who had resigned, or who had been removed by the court, or whose resignation had been accepted after he had once assumed the trust.¹ That when one of two or more trustees, appointed by deed or will, refuses to accept

¹ *In re Stevenson*, 3 Paige, 420; *Nicholson v. Wadsworth*, 2 Swanst. Rep., 370; *Adam v. Taunton*, 5 Mad. Rep., 438; *Bonefant v. Greenfield*, 1 Leon. Rep., 60; *In re Van Wyck*, 1 Barb. Ch. R., 566; *King v. Donnelly*, 5 Paige, 46.

the trust and to execute the same, or dies, the whole of the trust estate vests in the other trustees who accept it.¹ But the statute does not authorize those who remain, after a co-trustee has *resigned* or has been *removed* from his trusteeship, to execute the trust alone; that can be done only in cases where a co-trustee has died or never accepted the trust.² The appointment of new trustees by the court does not of itself vest in them the trust property except in cases under the provisions of the Revised Statutes; when those provisions do not apply, the case remains as at common law.²

The Court of Chancery in New York, to which these powers in the 68th, 69th and 70th sections mentioned, were originally given, had authority under its general jurisdiction, and independent of any special statute, to remove a trustee on good cause shown, and to substitute another in his stead.³ In the case of *King v. Donnelly*,⁴ it was held by the court that although where several persons are named as trustees, and one of them refuses to accept and execute the trust, the whole estate will vest in the others who act, yet it is otherwise where lands are devised to trustees, and all the devisees decline the trust. That in such case the legal estate must of necessity vest in the devisees for the benefit of the *cestui que trust*, who is the real object of the testa-

¹ See preceding note.

² In *Matter of Van Wyck*, *ut supra*; see *Parker v. Converse*, 5 Gray, (Mass.,) 336.

³ *People v. Norton*, 5 Selden, 176.

⁴ 5 Paige, 46.

tor's bounty, if the trust itself is legal: but in such case the devisees could not be compelled to execute the trust against their wills, and the execution thereof would necessarily devolve upon the court; and the trustees who decline the execution of the trust confided to them might be removed by the Chancellor and others be appointed in their place. But this must be done by the court under the statute, upon the bill or petition of a person interested in the execution of the trust.¹

Under the New York Constitution of 1777, the Court of Chancery and the Supreme Court were organized as separate tribunals, the one as a court of equity, the other as a court of law. The offices of chancellor and judges of the Supreme Court also existed under that Constitution. The separate jurisdiction of these courts continued until abolished by the Constitution of 1846, by which the Supreme Court was vested with general jurisdiction in Law and Equity.² It also clothes the Legislature with the same powers to alter and regulate the jurisdiction and proceedings in law and equity theretofore possessed by them.³ It authorizes the Legislature to confer equity jurisdiction in special cases, upon the County Judge.⁴ It declares that such parts of the common law, &c., as were in force in the colony of New York, on the nineteenth day of April, 1775, which have not been altered by legislative action,

¹ See preceding note.

² Const. 1846, art. 6, sec. 3.

³ Id. sec. 5.

⁴ Id. sec. 14; Laws of 1847, p. 319.

&c., are still in force as a part of the law of the State, and it abrogates all such parts as are repugnant to the Constitution. By their act of May 12, 1847, the Legislature organized the higher courts created by the Constitution; and by the 16th section of that act they provided that the Supreme Court should possess the same powers, and exercise the same jurisdiction as was then possessed and exercised by the Supreme Court and Court of Chancery; and that the Justices of the Supreme Court should possess the powers and exercise the jurisdiction then possessed and exercised by the Justices of the late Supreme Court, Chancellor, Vice Chancellor, and Circuit Judges, so far as the powers and jurisdiction of said courts and officers were consistent with the Constitution and provisions of the act.¹ Such is the nature and extent of equity or chancery jurisdiction, as a branch of the common law in the State of New York, from which it will be observed, that the inherent jurisdiction of chancery in cases of trust, is the same as at common law, except so far as trusts at common law have been regulated or abolished by statute.²

Says Judge Willard,³ "In New York the law with respect to uses and trusts, underwent a great change at the revision of the statutes, in 1830. The object of the Legislature was to put an end to mere formal or passive trusts by converting them into legal estates in the beneficial owner, and thus effectuate

¹ See preceding note.

² In *Matter of Van Wyck*, 1 Barb. Ch. R., 566; see *People v. Norton*, 5 Seld., 176.

³ Will. Eq., 415.

the original intention of the statute of uses.¹ To accomplish this purpose, uses and trusts, except as authorized and modified by the act, were abolished, and every estate and interest in lands, was declared to be a legal right, cognizable as such in courts of law, except when otherwise provided by the act.² The section which accomplished the main purpose of the Legislature, was in these words: "Every person, who by virtue of any grant, assignment, or devise, now is, or hereafter shall be entitled to the actual possession of lands, and the receipt of the rents and profits thereof, in law or in equity, shall be deemed to have the legal estate therein, of the same quality and duration, and subject to the same conditions as his beneficial interest."³ The operation of the 47th section accomplishes all that could have been effected by the most liberal construction claimed for the statute of uses.⁴ All former trusts created, however numerous or extended the series, are, as by magic, transformed into legal estates. A conveyance to A. in trust for B., in trust for C., at once vests the title in C., and would vest the title in the *cestui que trust* last named however numerous the trusts created. It is further enacted, that the 47th section should not divest the estate of any trustee where the title of such trustee is not merely nominal, but is connected with some power of actual disposition or management in relation to the lands which are the subject

¹ 3 R. S., 584, Revisors' notes; *Johnson v. Fleetwood*, 14 J. R., 180.

² 1 R. S., 727, sec. 45.

³ Sec. 47.

⁴ *Johnson v. Fleet*, 14 Wend., 180.

of the trust.¹ “That class of trusts was left unexecuted by the statute of uses, and was enforced only in equity. The legal estate was in the trustee, because, without such legal estate, the latter could not fulfil the purposes of the trust.”² The statute, by its forty-ninth section, enacts that every disposition of lands, whether by deed or devise, made afterwards, should be directly to the person in whom the right to the possession and profits shall be intended to be invested, and to no other, to the use of, or in trust for, such person; and if made to one or more persons, to the use of or in trust for another, no estate or interest, legal or equitable, shall vest in the trustee—consequently, under the operation of the forty-seventh section, the title vests directly in the party beneficially entitled.³ And in cases where property is purchased by one, and the consideration paid by another, the statute abolished resulting trusts, except in favor of creditors of the party paying the consideration, to the extent necessary to satisfy their just demands; and, except in cases where the person taking the absolute conveyance in his own name does it without the consent or knowledge of the person paying the consideration; or where such alienee, in violation of some trust, purchases the lands so conveyed with moneys belonging to another person.⁴ But

¹ 1 R. S., 727, sec. 48.

² Will. Eq., 415, 416; 1 Mad. Ch. Pr., 356, 357.

³ *Braker v. Devereaux*, 8 Paige, 518; but see *Vandervolgen v. Yates*, 3 Barb. Ch., 243; *Rawson v. Lampman*, 1 Selden, 456; see 2 Comst., 19.

⁴ 1 R. S., 728, sec. 51, 52, 53; Will. Eq., 417.

the statute recognizes implied trusts, which result, as a construction of law, upon the acts or situation of the parties.¹

And the statute also allows express trusts, for the purposes before cited.² The influence which these special provisions of the statute have upon the subject of trusts, in New York, causes a corresponding deviation from the common law doctrines thereon. Thus much has been stated for the purpose of setting forth the means of understanding the law of New York on the subject of the constitution of trustees by the Supreme Court. In matters where the statute has not interfered to prohibit the trust, or direct the manner of its execution, the court will be governed by the rules of the common law on that subject.

The owner of real estate may create an interest in the rents and profits, or the income thereof, under the provisions of the statute, in trust for the benefit of a third party, who, from improvidence or otherwise, the donor does not think proper to entrust with the absolute disposition and control of his beneficial interest in the trust property by anticipation. But the rights and interests of persons for whose benefit a trust for the payment of a *sum in gross* is created, is assignable, and can be reached by a creditor's bill.³ Therefore, the trust which cannot thus be reached must be for the rents and

¹ Will. Eq., 416; Murry v. Ballou, 1 J. Ch. R., 575; Frost v. Beekman, 1 J. Ch. R., 301; Johnson v. Fleet, 14 Wend., 181.

² Ante.

³ 1 R. S., 730, sec. 63; Degraw v. Classon, 11 Paige, 136.

profits, which is a sum uncertain, and cannot be anticipated.¹

Where an express trust is created for any purpose not enumerated in the act of "Uses and Trusts," no estate vests in the trustees; but if the trust directs or authorizes the performance of that which is lawful and proper to be done, it will be deemed a "power in trust," and will be subject to the provisions of the statute in relation to such powers.²

The Revised Statutes of New York have not attempted to define the objects for which express trusts of personal estate may be created. Such trusts, therefore, may be created for any purpose which is not illegal. But in all respects except the mere vesting the legal title to the property in the trustee, instead of the *cestui que trust*, the conveyance or bequest of personal estate must be governed by the same rules applicable to grants or devises of similar interests in lands or real property.³ The statute creates the analogy between the interests or estates in *real* and *personal* property, by restricting the power of suspending the absolute ownership or the right of alienation, within the same limits; by confining the power of accumulating the income of personal estate, and the rents and profits of real estate, to the same objects, and within the same limits; and finally by declaring in general terms, that in all other respects limitations of future or

¹ Will. Eq., 421.

² 1 R. S., 729, sec. 58; *Selden v. Vermilyea*, 1 Barb. S. C. R., 58; see also 1 R. S., 728, sec. 55; 1 R. S., 729, sec. 59; Willard's Eq., 422.

³ Willard's Eq., 423.

contingent interests in personal property shall be subject to the rules prescribed by the Revised Statutes in relation to future interests in lands.¹

By the provisions of the statute,² a valid trust for the accumulation of rents and profits of real estate, or the interest or income of personal property, can only be created for the benefit of minors in existence when the accumulation commences; and the accumulation ceases with the termination of such minority.³

Where the same instrument contains a valid trust and also an invalid one, whether the trusts relate to real or personal estate, the court will sustain the legal or valid trusts, if they can be separated from the illegal and void ones.³

Where property is bequeathed in trust, and no trustee is appointed, in cases of real estate, the court considers the heir at law as trustee; in case of personal property, the personal representatives: and where the estate is devised in trust to a body incapable of taking, the trust will attach to the estate, and the heir, etc., become trustee.⁴

It is held, in the case of *People v. Norton*,⁵ that the Court of Chancery had inherent authority, apart

¹ Willard's Eq., 423, 4; 1 R. S., 773, sec. 2; *Gott v. Cook*, 7 Paige, 534; S. C. on Apl., 24 Wend., 641; *De Peyster v. Clendining*, 8 Paige, 305.

² 1 R. S., 726, sec. 37 and 38, also id., 773, sec. 3 and 4; *Bryan v. Knickerbocker*, 1 Barb. Ch. R., 425, 426; Will. Eq., 424; *Jennings v. Jennings*, 3 Seld., 547; also, *Amory v. Lord*, 5 Seld., 403.

³ *Van Vechten v. Van Vechten*, 8 Paige, 104; *De Peyster v. Clendining*, 8 Paige, 305; S. C., 26 Wend., 21; *Irving v. De Kay*, 9 Paige, 523; S. C., 5 Denio, 646.

⁴ Will. Eq., 424; 1 Mad. Ch. Pr., 364; *King v. Donnelly*, 5 Paige, 46; *Burnett v. Silliman*, 3 Kern., 93.

⁵ 5 Seld., 176.

from the statute, to remove a trustee and appoint a new one; and, hence in cases not otherwise provided for or regulated by statute, the court would exercise its inherent power setting as a court of chancery.

PENNSYLVANIA.—Prior to 1825 there was no Court of Chancery in Pennsylvania, consequently the execution of trusts was unaided by the courts. In 1825 the legislature passed “An act to prevent the failure of trusts,”¹ by which they enacted, that the Supreme Court should have power to grant relief in equity in all cases of trusts, so far as regards the appointment of trustees, either in consequence of the death, infancy, lunacy or other inability of a trustee or trustees to fulfil his or their duties; or where a trustee or trustees named in any deed or last will and testament, renounce or refuse to act under such appointment; or where one or more of several co-trustees was dead or *non compos mentis*, and the duties of the trust required the joint act of the trustees; and also compelling the trustee or trustees, when the trust has expired, to convey the legal estate. By the 2d section of the act, they provided, that, in any of the aforesaid cases, the *cestui que trust*, or other persons interested in the execution of the trust, might apply to the court by petition, setting forth the facts of the case under oath or affirmation; and that the court, on hearing all parties concerned, were authorized to appoint a trustee or trustees in the place of those who may come within the provisions of the 1st section, hav-

¹ Dunlop's L. of P., 392, passed 22d March, 1825; Pamp. L., p. 107.

ing due regard to the original objects of the trust, as fully as a court of equity could or might do; and that, upon such appointment being made, all the estates, rights, powers and authorities of such superceded trustees should cease and determine, and be deemed and taken to vest in the person or persons so appointed as fully, to all intents and purposes as if they had been originally appointed trustees. The 3d section of the act provides for the settlement by the trustee, and his discharge by the court, from further duties and responsibilities.¹ By an act, 14th April, 1828, the same jurisdiction was extended to the circuit court² and the district court for the city and county of Philadelphia, and to the several district courts and courts of common pleas in the other counties of the state.³ And by the 13th section of the act of June 16th, 1836, "relative to the jurisdiction and powers of the courts,"⁴ the Supreme Court and the several courts of common pleas were invested with the jurisdiction and powers of a court of chancery so far as, among other things, relates to the control, removal and discharge of trustees, and the appointment of trustees and the settlement of their accounts.⁴ By the 15th section of the act, 27th July, 1842, it is provided, "that the Court of Common Pleas of each county, and also the district courts thereof, shall have full power and authority

¹ See preceding note.

² This court abolished by 163d section of Act of 14th April, 1834; see Dunlop P. L., p. 562.

³ Dunlop P. L., 420.

⁴ Dunlop P. L., 752.

to compel any infant trustee or trustees, or their guardian or guardians, to make and execute such deeds and assurances of trust estates to such person or persons entitled thereto as shall be equitable and just," and makes such deeds, etc, effectual in law to make good title, etc.¹

As to the mode of proceeding in these cases under the act of June 16, 1836, conferring upon the Supreme Court, etc., the jurisdiction and powers of chancery in certain cases, it must be by bill and subpoena.² The court will not grant relief upon petition, as by the act of 1825. But the act of March 22, 1825, does not empower the supreme court to compel a trustee to pay over trust moneys in his hands, and, in default thereof, to dismiss him from the trust.² By the 15th section of "An Act relating to assignees for the benefit of creditors, and other trustees," of June 14, 1836,³ it is provided: "That whenever any assignment, conveyance or transfer (excepting assignments or transfers for the benefit of creditors), shall have been made, or shall hereafter be made, by deed, will, or otherwise, of any estate, real or personal, to any person or corporation in trust for, or for the the use and benefit of, any person, or association of persons, or corporation; also, whenever any trust shall arise by operation or implication of law, the court of common pleas of the county in which any such trustee shall have resided at the commencement of the trust, or,

¹ Dunlop P. L., 879.

² *Ex parte* Hussey, 2 Whar., 330; also *ex parte* Morton, id.

³ Dunlop P. L., p. 689.

if such trustee be a corporation, in which such corporation is situate, or in which its principal officers shall have resided as aforesaid, shall exercise the jurisdiction and powers given by law in regard to such trusts: *Provided*, That nothing therein contained should extend to trusts created by will, and vested in executors or administrators, either by the words of the will, or by the provisions or operations of law, whenever such executors or administrators are, by the existing laws, amenable to the orphan's court."¹ By the 16th section of the same act, it is provided that the court of common pleas, or any judge thereof, on the application of any person interested in the trust fund or estate, co-trustee, or co-assignee, and, upon affidavit that any trustee as aforesaid is wasting, neglecting, or mismanaging such estate or fund, or is in failing circumstances, or about to remove out of the commonwealth, may cite such trustee to appear at a time named, and show cause why he should not be dismissed from his trust.¹ The 18th section of the same act provides that, in case of infancy, or temporary absence of any trustee, it shall be lawful for the court having jurisdiction as aforesaid to appoint a trustee during such infancy or absence; and that the trustee so appointed shall have all the necessary powers for the due administration of the trust.¹ The 20th section provides that when any trustee, etc., shall have been duly declared to be a lunatic, or habitual drunkard, or shall have removed from the state, or

¹ Dunlop P. L., 690.

ceased to have a known place of residence therein during the period of a year or more, the court having jurisdiction may dismiss him.¹ The 22d section provides that the court having jurisdiction may discharge a trustee, etc., upon his own application by bill or petition, for such cause as in equity would entitle him to relief.¹ The 23d section provides that the several courts having jurisdiction as aforesaid shall have power to appoint trustees, etc., as aforesaid, in the following cases:

1. Where any sole assignee or trustee shall renounce² the trust, or refuse to act under, or fully to execute the same.

2. Where any such trustee, etc., shall die, or be dismissed by the court from the trust, or shall be discharged by the court therefrom.

3. Where one or more of several trustees, etc., shall renounce or refuse as aforesaid, or shall die or be dismissed, or discharged as aforesaid, and the duties of the trust require the joint act of the trustees.

4. In any case in which a trust shall have been created and no person appointed, either by name or by description, to execute the same.

The appointing power aforesaid to be exercised on the application by bill or petition of any person interested in the subject of the trust, and not otherwise; due notice to be first given to all parties concerned.³

¹ Dunlop P. L., 691.

² Read v. Robinson, 6 W. & S., 329.

³ Dunlop P. L., 691.

It would seem that where the power or trust is in executors *virtute officii*, the Orphan's Court has exclusive jurisdiction; but where it is given to them *nominatim*, it has concurrent jurisdiction, with the Common Pleas.¹

The next of kin of a living *cestui que trust*, though the latter is of weak intellect, is not a person interested within the meaning of the 16th section, providing for the application by any persons interested in the subject of the trust, for the removal of a trustee.² When a trustee, on an inquisition, has been duly declared a lunatic or habitual drunkard, the inquisition is not of itself a removal, but only that upon which the court may remove, etc.³

The power of appointment under the 23d section, does not apply to the trusts annexed to the office of executor,⁴ nor to passive trustees where the deceased trustee was merely the depositary of the legal title.⁵

The office of trustee and executor may be vested in the same individual, yet be distinct, so that the acts pertaining to each office are distinct from each other.⁶

By the 1st section of the act relative to the appointment of trustees by the Orphan's Court, etc., it is provided that from and after the passing of said act (22d April, 1846), in all cases where any trustee

¹ Brown's Appl., 12 Penn. St. Rep., 333; Fritz's Appl., 4 W. & S., 435; Worman's Appeal, 1 Wharton, 96.

² Kuhler v. Hoover, 9 Barr., 331.

³ Sill v. McKnight, 7 W. & S., 244.

⁴ Olwin's Appeal, 4 Serg. & Watts, 492.

⁵ Carlisle's Appeal, 9 Watts, 332; see also 2 Ashm., 527.

⁶ Egbert's Appeal, 9 Watts, 300; Wheatley v. Badger, 7 Barr., 459.

or trustees created or vested with authority by the last will and testament of any deceased person, or any writing testamentary in the nature of a will, shall die, resign, or be otherwise removed from the trust, the Orphan's Court of the proper county shall have power to appoint another trustee or trustees to supply such vacancy; and such court shall require security for the faithful performance of the trust, etc.¹

Also by the 2d section of the act relative to the appointment of trustees in the county of Philadelphia, &c. (April 10, 1849),² it is provided that whenever by the provisions of any last will and testament admitted to probate in the city and county of Philadelphia, a trust has been or shall be declared of and concerning any real and personal estate, to be executed by the executor or executors of said last will, whether by virtue of their office or otherwise, and if any of the executors shall die, renounce, resign, be dismissed from or refuse to act in said trust, leaving the other executor or executors continuing therein, it shall be lawful for the Orphan's Court of the city and county of Philadelphia, on the application of any party in interest, and with the consent of such continuing executor or executors, with notice to such of the other parties in interest as the said court may deem material, to appoint a trustee or trustees in the place of the executors so dying, renouncing, resigning, dismissed, or refusing to act;

¹ Dunlop P. L., 960.

² Dunlop P. L., 1053.

which said trustee or trustees shall have the same power and interest over and in the premises in trust as those, etc., in whose stead they are appointed, etc.; and the court may also appoint a successor or successors from time to time to such trustees, whenever from death, resignation, or otherwise, the same may be necessary or expedient.¹

A married woman possessed of a separate estate under the act of 1848, may, by the act of 1850, apply to the Court of Common Pleas of the proper county, for the appointment of a trustee other than her husband. Where trustees reside out of the state, and any of the trust property is within the state, the court may appoint resident trustees to act in conjunction with the foreign trustee.²

MASSACHUSETTS.—It is provided by the Revised Statutes of Massachusetts, in “An Act giving equitable remedies in suits at law,”³ “that all suits for the enforcing and regulating the execution of trusts, etc., shall be by action of contract, setting forth the facts and circumstances of the case so far as may be necessary, and praying relief in equity; and by the 3d section of said act, it is provided, that in all the foregoing actions, (that of trusts is included) in which relief in equity is prayed for, the court (which by the 4th section of the act is made the Supreme Judicial Court,) at any time after commencement of process as well in term time as vaca-

¹ See preceding note.

² Dunlop P. L., 763.

³ Rev. Stat. 1854, chap. 371, p. 982; see also R. S. 1860, chap. 100, sec. 22, p. 503.

tion, may make and award all such decrees, judgments, orders and injunctions, and issue all such executions, and other writs and processes, and do all such other acts as may be necessary and proper, to carry into full effect the powers to grant such relief. It would seem from the decisions of the courts of Massachusetts in the case of trusts, that they claim a common law jurisdiction in such cases as necessary to give the relief required.¹ But in addition to this jurisdiction, the statutes of Massachusetts have made special provisions in the case of appointing and removing trustees. Thus, by the Revised Statutes,² in an act authorizing Judges of Probate to appoint trustees in certain cases, it is provided, "If, in any will creating a trust or trusts, the testator shall have omitted to appoint a trustee to carry the same into effect, the Judge of Probate may, after notice to all persons interested, appoint a trustee," and also, "the trustee so appointed, shall have and exercise the same powers, rights and duties, as if he had been originally appointed by the testator, and the trust estate shall vest in him in like manner as it would have vested if appointed by the testator."²

By an act for the appointment of trustees for minors and others, etc.,³ in the 1st section it is provided, that persons appointed trustees, etc., under

¹ See *Sanderson v. White*, 18 Pick., 332; *Murdock*, appellant, 7 Pick., 322.

² Rev. Stat. 1854, chap. 158, p. 332, March 18, 1845; see also R. S. 1860, p. 501.

³ Rev. Stat. 1836, chap. 69, p. 443; see also R. S. 1860, chap. 100, sec. 15, p. 502.

any last will, (excepting in cases where the testator orders or requests that such bond shall not be taken, unless, etc.,) shall, before entering on the duties of his trust, give bond with sufficient surety or sureties, to the Judge of Probate for the county in which the will shall have been proved, etc.; and by the act of March 20, 1843,¹ it is provided that the seventh and eighth sections of the sixty-ninth chapter of the Revised Statutes, are extended to trusts created by deed, either before or after the passage of said act. The seventh and eighth sections referred to, provide, (section 7) that when any trustee appointed either by testator or by Judge of Probate, shall become insane, or otherwise incapable of discharging his trust, or evidently unsuitable therefor, the Judge may, after notice to such trustee, and all others interested, remove him and appoint another in his stead, (section 8). When any person appointed a trustee, shall decline or resign the trust, or shall die before the objects thereof are accomplished, if no adequate provision is made by the will for supplying such vacancy, the Judge of Probate shall, after notice to all persons interested, appoint a new trustee to act alone or jointly with the others, as the case may be: and such trustees so appointed are to have the powers and discharge the duties, etc., the same as if originally appointed.² Thus, by the provisions of these acts, where vacancies occur in the office of trustee, under a will or deed or by the

¹ Rev. Stat. 1854, p. 253.

² Rev. Stat. 1836, p. 444; *Green v. Borland*, 4 Metcf., 330; *Hospital v. Amory*, 12 Pick., 445.

appointment of the court, such vacancies are to be filled by the appointment of the probate judge, unless otherwise provided for by the instrument creating the trust. By the 4th section of the act of 1836,¹ if the trustee neglects to give bond as required, he is deemed to have declined the trust, and the office is vacant. In the case of *Dorr v. Wainright*,² it is decided that, in the case of a general legacy to one for life, with remainder over, if no provision is made in the will for the appointment of a special trustee to manage the fund, etc., that it is incumbent on the executor to perform these duties, and his bond as executor covers his proceedings in relation to such legacy. By the 5th section it is provided that every trustee may resign his trust, when it shall be proper to allow the same in the opinion of the probate judge. The 6th section provides that no person, succeeding to such trust as executor or administrator of a former trustee, shall be required to accept the same against his will. Then follow the 7th and 8th sections above referred to. The 12th section³ provides that said courts, (probate and supreme judicial) respectively, may hear and determine in equity all other matters relating to the trusts mentioned in chapter 69.

By the Revised Statutes of 1860, ch. 31, p. 205, section 1, of an act upon the subject "of donations and conveyances for pious and charitable purposes," it is provided that the deacons, church-wardens, or

¹ See preceding note.

² 13 Pick., 328.

³ Rev. Stat., chap. 69, p. 445, sec. 12.

other similar officers of all churches or religious societies, if citizens of the state, shall be deemed bodies corporate for the purpose of taking and holding in succession all grants and donations, whether of real or personal estate, made either to them and their successors, or to their respective churches, or the poor of their churches. The 2d section provides that, "where the ministers, elders or vestry of a church are, by such grants and donations joined, with the deacons, etc., as donees or grantees, such officers and their successors shall be deemed the corporation for the purposes of such grants, donations, etc." The 3d section provides that the minister of every church or religious society of whatever denomination, if a citizen, etc., may take in succession any parsonage land granted to the minister and his successors.¹ The 4th section provides that the deacons, etc., shall have no power to convey away the lands thus donated, etc., without the consent of the church, or their committee appointed for that purpose; neither shall the wardens without the consent of the vestry. The 5th section provides that the minister shall not convey the lands held by him in succession, for a longer term than he continues to be their minister, except by the consent of that body of which he is the minister.²

By the 8th section, the overseers of the monthly meeting of Friends or Quakers are the body corpo-

¹ Rev. Stat. 1860, chap. 31, p. 205; see *Soher v. W. & V. St. Paul's Church*, 12 Metc., 250; 12 Mass., 546 and 16 Mass., 495; 4 Cush., 281, and 9 Cush., 181; 10 Mass., 93; 15 Mass., 464; 6 Greenl., 355.

² 2 Mass., 500; 14 Mass., 333.

rate for the purposes aforesaid, and act as trustees. By the 9th section, all trustees whether incorporated or not, who hold funds given or bequeathed to a city or town, for any charitable, religious or educational purposes, must make an annual exhibit of the condition of such funds to the board of aldermen of the city and selectmen of the town, to whom such funds have been donated; and by the 10th section, the probate court of the county in which the city or town is situated to which funds have been donated as above, on the petition of five persons, shall cite the parties interested to appear and answer; and if a trustee neglects or refuses to make such exhibit, or is incapable of discharging the trust or unsuitable to manage the affairs of the same, the court may remove such trustee and supply the vacancy.¹

By the 37th section of chapter 68, Revised Statutes, 1860,² it is provided, "When the charter of a corporation expires, or is annulled or dissolved under the provisions of the 35th section, the supreme judicial court, on application of a creditor, stockholder or member, within three years, may appoint trustees or receivers to take charge of the estate, etc.;" and by the 38th section the court has jurisdiction in equity of the application and of all questions arising in the proceedings, and may make such orders, injunctions and decrees therein as justice and equity require.

By the 41st section of chapter 91, Revised Sta-

¹ Rev. Stat., 1860, chap. 31, p. 206.

² Rev. Stat., p. 388.

tutes, 1860,¹ the court (S. J. C.) is empowered to appoint a trustee or trustees to take charge of funds arising from the sale of wood cut from land held by a person for life, with remainder or reversion to another in fee simple, under the provisions of said act; and by the 43d section, the court is empowered to remove such trustees from time to time.¹

By the 41st section of the 107th chapter, Revised Statutes, 1860,² the court is authorized to appoint a trustee to receive and manage the personal property awarded to the woman by the court, on a decree of divorce, under the provisions of the 40th section.

By the 4th section of the 108th chapter, Revised Statutes, 1860,³ the supreme judicial court may appoint a trustee, on the petition of a married woman, to take charge of her separate estate.

The appointment of a new trustee by the probate court, in the place of one appointed under a will, and who is deceased, under the Revised Statutes,⁴ vests the trust estate in him without further action.⁵

ILLINOIS.—Under the laws of Illinois, the Circuit Courts have jurisdiction in law and equity, and in all cases where they have jurisdiction as Courts of Chancery, their mode of proceeding is according to the general usages and practice of Courts of Equity, except so far as their “CHANCERY CODE” may direct

¹ Page 473.

² Page 535.

³ Page 538.

⁴ Rev. St., chap. 69, sec. 8.

⁵ *Parker v. Converse*, 5 Gray, 336. Likewise in Tennessee, see *Woolbridge v. Planters' Bank*, 1 Sneed, 297.

to the contrary.¹ The Supreme Court has appellate jurisdiction in all cases,² and may take jurisdiction in agreed cases in law or chancery where they are certified from the Circuit Court under the provisions of the 16th section of the Revised Statutes, 1845, chap. 29. Also the Cook county Court of Common Pleas, has concurrent jurisdiction with the Circuit Courts in all suits and proceedings in law and equity, within Cook county. Under the chancery powers of these courts, the proceedings in the appointment of trustees by the court, will be according to the general usages and practice of courts of equity where the trusts are executory. By statute,³ in all cases where persons are seised of or in any messuages, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use or trust, etc., of another, such estate is vested in the *cestui que trust*, to all intents, constructions, and purposes of law. What construction the courts have given to this section of the statute, is not known; but they recognize still the legal title of the estate as being in the trustee.⁴

In the case of *Hall v. Irwin*,⁵ the court recognized the doctrine that when a trust is created and

¹ See S. T. & B's Stat. Ill., 1858, 1 v., 138, Cha. Code; Rev. Stat. 1845, chap. 21; Rev. Stat. 1845, chap. 29, sec. 29.

² Const., art. 10, sec. 5.

³ Rev. Stat., 1845, chap. 24, sec. 3; D. B. Cook & Co's. edit. of S. T. & B. Stat. Ill., 1858, p. 959.

⁴ *Sargent v. Howe*, 21 Ill., 148; *Gun v. Carlisle*, 18 Ill., 338; *Reece v. Allen*, 5 Gill. R., 236; *Hall v. Irwin*, 2 Gill., 176; *Morrison v. Kelley*, 22 Ill. R., 610.

⁵ *Hall v. Irwin*, *ut supra*.

no trustee appointed, a court of equity will appoint a trustee.

In the case of *Morrison v. Kelley*,¹ G., by warranty deed, conveyed to R, one undivided half of certain real estate in trust for the separate use of C. H., wife of A. H., providing in the deed, that in case of the decease or legal incapacity of the said trustee R, before the full execution of the trusts in said deed created and declared, then, in either case, the trusts should be executed, etc., by the Court of Chancery of the judicial district or circuit in which La Salle county shall then be situated; and the legal estate, etc., shall, in such case, vest in said court of chancery. The trustee died before the complete execution of the trusts, and a trustee was appointed by the Circuit Court of La Salle county, and the legal estate was vested in him. In giving the decision, Walker J., remarked: "The grantor may declare any use or trust, or confer any power upon the trustee or others which he may choose, so that the object is not prohibited by law, by public policy or good morals, and it will be binding. He may declare the objects of the trust, and confer the power to execute them upon the trustee or upon another. He may convey to a trustee for a limited period, and provide that at that period another may take; or that at the end of the time, or the happening of an event designated, a person named by the deed may nominate." "It will not be contested that a grantor conveying to a trustee, may confer a power upon an officer, as

¹ 22 Ill., 610.

the chief executive of the state, a circuit judge, a probate judge, or upon any court of record, to appoint a trustee in the event of the death of the trustee named in the deed. From the language it is clear that it was the intention of the grantor in case of the death of Reed, before the trust was executed, to confer upon the court the power to complete its execution, and expressly provides it shall do so in such a manner as the court shall order or decree, or according to the practice of the court. And when the court shall become satisfied of the death of the trustee, and that the trusts created by the deed are not fully executed, it becomes the duty of the court, on application, to proceed to have the trust executed precisely as if a trustee were to die without heirs, or a trustee in whom a personal trust or confidence is reposed by the deed, dies before he has carried out its provisions. In such cases it is the practice of the court of chancery rather than permit the trust to fail for want of a trustee to appoint a suitable trustee, who succeeds to all the powers, rights and duties, as if he were named by the deed.”¹ Such appears to be the doctrine of Illinois upon this subject. There are few special acts of the legislature upon the subject of appointing trustees, but it is left mostly to the action of the court of chancery under its inherent jurisdiction and common law powers. By a statute passed 14th February, 1857,² it is provided that, in

¹ See preceding note.

² Sess. L., p. 52; Cook's S. T., 1858, p. 163.

all cases where property, either real or personal, has been conveyed to a trustee, etc., for the use of a married woman, and the trustee or other person has no interest in the property coupled with her interest, and the trustee dies holding such trust, in all cases where it would be the duty of a court of chancery, upon proper application, to appoint another trustee, the court may, if it think proper, and that the interest of the woman would be promoted thereby, decree that such married woman hold and convey such property absolutely and in her own name, etc.¹

MICHIGAN.—The Circuit Courts of the State of Michigan are, by statute, invested with general chancery powers, to be exercised by the circuit judges.² The powers and jurisdiction of the “circuit courts in chancery,” in and for their several counties, are declared to be co-extensive with the powers and jurisdiction of the court of chancery in England, with the exceptions, additions and limitations created and imposed by the Constitution and laws of the state.³ This gives to the circuit courts common law jurisdiction in the cases of trusts, trustees, etc., except so far as the same may be altered and modified by statute. Uses and trusts, except as authorized and modified by the statute,⁴ are abolished, and estates held as uses, executed

¹ See preceding note.

² Rev. Stat., 1846, chap. 90, sec. 1; Cooley Comp. Laws Mich., 1857, p. 1006.

³ R. Stat., 1846, chap. 90, sec. 21; id., Cool. Comp., sec. 3475, p. 1009.

⁴ Rev. Stat. 1846, chap. 63, sec. 1; 4 Paige, 352; 4 Paige, 403.

under the laws of the state, are confirmed as legal estates. By section 4, active trusts are excepted from the operation of the statute. So, likewise, by the 6th section, trusts resulting by implication of law are exempted, except in cases where a grant is made to one for money paid by another; and the creditors of the party paying the money are excepted from this exception.

Express trusts are allowed¹ to be created for the following purposes:

1. To sell lands for the benefit of creditors.
2. To sell, mortgage or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon.
3. To receive the rents and profits of lands, and apply them to the use of any person, during the life of such person, or for a shorter term, subject to the rules prescribed in chap. 62, Revised Statutes, 1846.
4. To receive rents and profits of lands and to accumulate the same for the benefit of any married woman, or for either of the purposes and within the limits prescribed in chapter 62, *ut supra*.

For the beneficial interest of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to limitations as to time prescribed by this title.

By the 12th section² a devise of lands to executors or trustees, to be sold or mortgaged, when such

¹ Rev. Stat., 1846, chap. 63, sec. 11.

² *Idem*.

trustees are not empowered to receive the rents and profits, vests no estate in the trustee, but they take a power in trust, and the legal title descends to the heir or passes to the devisees of the testator, subject to the execution of such power.

By the 14th section¹ when an express trust is created for any lawful purpose, not enumerated in the preceding sections, no estate vests in the trustee or trustees, but they take a power in trust subject to the regulations of the 64th chapter, Revised Statutes, 1846, and the land descends, etc., subject to the execution of such power.

By the 16th section² express trusts, valid in their creation, except as qualified by following sections, vest the whole estate in the trustee in law and equity, subject only to the execution of the trust; and the *cestui que trust* takes no estate in the lands, but may enforce the trust. But the 17th section qualifies this by providing that it shall not prevent any person creating a trust from declaring to whom the lands to which the trust relates, shall belong in the event of the failure or termination of the trust, nor shall it prevent him from granting or devising such lands, subject to the execution of such trust; and every such grantor shall have a legal estate in such lands against all persons except the trustee and those lawfully claiming under him. The 18th section provides that all interests not embraced in the express trust, etc., remain in the grantor of the trust. By the 20th section it is provided,

¹ Rev. Stat., 1846, chap. 63.

² Idem.

that when an express trust is created, but is not contained in or declared in the conveyance to the trustees, such conveyance shall be absolute as against the subsequent creditors of the trustee not having notice of the trust; and also as against purchasers from the trustee without notice and for a valuable consideration. By the 23d section, when the purposes of the trust cease the trust ceases.

By the 24th section, upon the death of the surviving trustee of an express trust, the trust vests in the Court of Chancery (if unexecuted), with all the powers and duties of the original trustees, and is to be executed by some person appointed for that purpose, under the direction of the court.

By the 25th section, the Court of Chancery may accept the resignation of a trustee upon his own petition, and discharge him from the trust, under its own regulations and upon its own terms. By the 26th section, upon the petition or bill of any person interested in the execution of an express trust, the court of chancery may remove any trustee who has violated or threatens to violate his trust, or who is insolvent, or whose insolvency is apprehended; or who, for any other cause, shall be deemed an unsuitable person to execute the trust. By the 27th section, the chancellor¹ is empowered to appoint a new trustee in the place of a trustee resigned or removed; or the court may appoint one of its officers to execute the trust where, in consequence of resignation or removal, there is no acting trustee. The statutes

¹ See chap. 90, R. S. 1846, sec. 2, Laws of 1847, p. 33, and June 27, 1851.

of Michigan, on the subjects of trusts and trustees, being very similar to those of New York, they will be subject to a like construction. From an examination of the Reports of that state, it would seem that the attention of their courts has not been called to this subject. By the laws of Michigan,¹ every grant or assignment of any trust in lands, goods or things in action, must be in writing signed by the party making the same, or by his authorized agent, or it is void.

WISCONSIN.—The statute of Wisconsin on uses and trusts, like those of New York and Michigan, provides that uses and trusts, except as authorized and modified in that chapter,² are abolished; and every estate and interest in lands is deemed a legal right, cognizable in courts of law, except where otherwise provided in this title (Uses and Trusts). The 2d section provides that estates held to the use of another, executed under the laws of the state, as they formerly existed, are confirmed legal estates. By the 3d section, persons who, by grants, assignments or devises, are entitled to the possession of lands, and the receipt of the rents and profits, in law or equity, are deemed to have the legal estate to the same extent, etc. By the 4th section, active trusts are not affected by the 3d section. By the 5th section, deeds, etc., are to be made directly to the persons beneficially interested, except as otherwise provided, etc.; and when made to a trustee,

¹ Rev. Statutes 1858, p. 942 and 948, sec. 3177 and 3199; *Whiting v. Gould*, 2 Wis. Rep., 552.

² Chap. 84, sec. 1, Rev. Stat. of Wis., 1858; see *Whiting v. Gould*, 2 Wis. Rep., 552.

for the use, etc., of another, the trustee takes no estate. By the 6th section, resulting trusts and authorized express trusts are exempted from the operation of the statute.¹ By the 7th section, when a grant of land is made to one, and the consideration paid by another, no trust results; but the alienee takes the legal title, subject to the 8th section, which provides that such conveyance shall be presumed fraudulent as against the creditors of the person paying the consideration; and, where a fraudulent intent is not disproved, a trust shall arise for the creditor to the extent of paying his debt. But the 9th section provides that the 7th section shall not apply when the alienee takes the conveyance without the knowledge or consent of the party paying the consideration money, or where it is done in violation of some trust, or with moneys belonging to another. By the 10th section, no implied or resulting trust is to defeat or prejudice the title of a purchaser for a valuable consideration, without notice. By the 11th section, express trusts are authorized for the following purposes:

1. To sell lands for the benefit of creditors.
2. To sell, mortgage or lease lands, for the benefit of legatees, and for the purpose of satisfying any charges thereon.
3. To receive the rents and profits of land, and apply them to the use of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in the 83d chapter.²

¹ See *Rogan v. Walker*, 1 Wis. Rep., 527.

² Rev. Stat., 1858, p. 526, chap. 83.

4. To receive the rents and profits of lands, and to accumulate the same for the benefit of any married woman, or for any of the purposes and within the limits prescribed within preceding chapter (83).

5. For the beneficial interest of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to limitations as to time, prescribed herein.

By the 12th section, devises of lands to executors or other trustees, to be sold or mortgaged, without empowering them to receive the rents and profits, vest no title in them; but the trust becomes valid as a power, and the land descends subject thereto. By the 13th section, where a trust is created to receive the rents and profits of lands, and no valid direction for accumulation is given, the surplus above what is necessary for the education and support of the person beneficially interested, is liable in equity to the creditors of such person, the same as other personal property which cannot be reached by execution at law. By the 14th section, when an express trust is created for any purpose not enumerated, and yet which may be lawfully performed under a power, no estate vests in the trustee, but he has a power in trust which may be executed under the provisions of the statute on that subject; and by the 15th section, the lands descend subject to the execution of such power. By the 16th section, every authorized express trust vests the whole title in the trustee, subject to the execution of the trust; and the *cestui que trust* takes no estate in the land; but may enforce

the execution of the trust. By the 17th section, he who creates the trust may declare to whom the lands shall go on the failure or determination of the trust; and he may grant or devise such lands subject to the execution of such trust; and the grantor's title shall be good as against all except the trustees and those lawfully claiming under them. By the 18th section, it is provided that every estate and interest not embraced in the express trust or otherwise disposed of by the instrument, remains in, or shall revert to the person creating the trust. By the 19th section, *cestuis que trust* who are to receive the rents and profits of lands cannot assign; but those who receive a sum in gross can assign, etc. By the 20th section, when a trust is created but not contained in the conveyance to the trustee, it is to be taken as absolute in the trustee, as against subsequent creditors of the trustee, not having notice of the trust, and also purchasers from the trustee without notice and for a valuable consideration. But by the 21st section, where the trust is mentioned in the conveyance to the trustee, then any conveyance by the trustee in contravention of the trust is absolutely void. By the 24th section, upon the death of a surviving trustee of an express trust, the trust if unexecuted vests in the Circuit Court, with all the powers and duties of the original trustee, and is to be executed by some person appointed for that purpose, under the direction of the court. By the 25th section, a trustee of an express trust, upon petition to the circuit court, may tender his resignation and apply to be discharged from the trust; and

the court may accept his resignation and discharge him under such regulations as shall be established by the court for that purpose, and upon such terms as the interest of those interested in the execution of the trust may require. By the 26th section, upon the petition or complaint of any person interested in the execution of an express trust, etc., the circuit court may remove any trustee who shall have violated or threatened to violate his trust, or who shall be insolvent, or whose insolvency shall be apprehended, or who for any other cause shall be deemed an unsuitable person to execute the trust.¹ By the 27th section, the circuit court is authorized to appoint a new trustee in the place of one resigned or removed, and when in consequence of such resignation or removal there remains no acting trustee, the court may appoint new trustees, or cause the trust to be executed by one of its officers under its own direction.

The powers in trust referred to are thus defined: By the 24th section of the 85th chapter Revised Statutes, 1858, on Powers, it is provided, that every trust power, unless its execution or non-execution is made expressly to depend upon the will of the grantee, is imperative, and the execution may be enforced by the parties, etc. By the 25th section, the power does not cease to be imperative where the grantee is authorized to select any and exclude others of the persons designated as the objects of the trust. By the 28th section, if the trustee of a power

¹ *Geesse v. Beall*, 3 Wis. Rep., 367.

with the right of selection, die without making any selection, then all the objects designated are equally entitled. By the 29th section, when a power in trust is created by will and no person is designated to execute it, its execution devolves upon the Circuit Court of the proper county. By the provisions of the 30th section, the provisions of sections 22, 23, 24, 25, 26, and 27, of chapter 84, in relation to express trusts and trustees, are applied to powers in trust and the grantees of such powers.

By the Constitution of Wisconsin,¹ the judicial power of the state, both as to matters of law and equity, is vested in the Supreme Court, Circuit Court, Courts of Probate, and Justice of the Peace. The legislature are authorized, in the same section, to vest municipal courts with such jurisdiction as they may deem necessary, and also to establish inferior courts in the several counties with limited civil and criminal jurisdiction. By the 3d section of the 7th article, the Supreme Court has appellate jurisdiction only; but it has power to issue writs of *habeas corpus*, *mandamus*, injunction, *quo warranto*, *certiorari*, and other original and remedial writs, and to hear and determine the same. Also by the 5th section of chap. 115,² the Supreme Court has powers in addition to those above named, to issue writs of prohibition, error, *supersedeas*, *procedendo*, *scire facias*, and all other writs and processes not specially provided for by statute, which may be necessary to

¹ Art. 7, sec. 2.

² Rev. Stat. 1858, p. 639.

enforce the due administration of right and justice throughout the state. And by the 7th section of chapter 115, the Supreme Court is vested with full power and authority to carry into complete execution all its judgments and determinations in the matters above enumerated, and for the exercise of its jurisdiction as the supreme judicial tribunal of the state, agreeably to the usages and principles of law.

By the 8th section of the 7th article of the Constitution, the Circuit Court has original jurisdiction in all matters, civil and criminal, within the state, and not excepted in the Constitution. They also have power to issue writs of *habeas corpus*, *mandamus*, injunction, *quo warranto*, *certiorari*, and all other writs necessary to carry into effect their orders, judgments, and decrees; and by the 4th section of chapter 116, Revised Statutes 1858, they have jurisdiction in all civil actions within their respective circuits; and the courts in term time, and the Judges thereof in vacation, have power to award throughout the state, returnable in the proper county, writs of injunction, *ne exeat*, and all other writs and process necessary to the due execution of the powers vested in them. The jurisdiction of the county courts extends to the probate of wills, granting letters testamentary, of administration and guardianship, etc., and special jurisdiction is conferred upon certain county courts, unnecessary to notice for the purposes of this work.

From the foregoing it will be seen that the Supreme Court and Circuit Courts of Wisconsin have a common law jurisdiction in equity over mat-

ters of trusts, when, by the provisions of the statute on that subject, that jurisdiction has not been taken away or modified. By the provisions of the 13th section of the 14th article of the Constitution it is provided that such parts of the common law, then in force in the territory of Wisconsin, as was not inconsistent with the Constitution, should continue to be a part of the law of the state, until altered or suspended by the legislature. There are few recorded decisions of the Wisconsin courts upon the subjects embraced within the provisions of these statutes; but the provisions themselves are so similar to the New York statutes that the decisions of the New York courts may be referred to for aid in their construction.

NEW JERSEY.—By the Constitution of New Jersey a court of chancery constitutes a branch of the judiciary of that state.¹ This consists of a Chancellor who is the Ordinary or Surrogate-General, and Judge of the Prerogative Court. The proceedings in matters of trusts and trustees generally would be according to the usages of the common law. By an express provision of the statute,² when any trustee appointed by last will and testament neglects or refuses to act, or dies before the completion of the trust, the Orphan's Court of the county where the testator resided at the time of his death, is authorized to appoint some suitable person to execute the trust, etc. By the 7th section of the

¹ Art. 6, sec. 4.

² Rev. Stat., 1847, tit. 7, chap. 5, sec. 13.

5th chapter, title 7th, one of the judges of the Orphan's Court, on complaint that a trustee, etc., of a minor's estate is like to prove insolvent, etc., may order him to give security, etc. These are all the special provisions made by statute for the appointment of trustees by the court; and in the absence of special regulations upon this subject the Court of Chancery would be governed by the usages of the court acting in virtue of its common law jurisdiction.

CONNECTICUT.—The judicial power of the State of Connecticut is vested in a Supreme Court of errors, a Superior Court, and such inferior courts as the General Assembly shall, from time to time establish; and their powers and jurisdiction are to be defined by law. By statute it is provided¹ that the Superior Court shall have jurisdiction of all suits for relief in equity, etc., and the proceedings shall be according to the rules in equity. Also the County Court has concurrent jurisdiction with the Superior Court in all cases in equity, etc., where the sum does not exceed three hundred and thirty-five dollars, except suits for relief against judgments, and suits pending in the Superior Court.² And the Supreme Court of errors has jurisdiction final and conclusive, in matters of law and equity, where it is brought by error or complaint from the judgment or decree of the Superior Court.³

Assignments to trustees for the benefit of creditors

¹ Stat. of Conn., compiled 1854, tit. 5, chap. 2, sec. 20, p. 266.

² Comp. Stat. 1854, tit. 5, chap. 3, sec. 33.

³ Comp. Stat. 1854, tit. 5, chap. 1, sec. 10, p. 264.

must be in writing, and be for all, in proportion to their respective claims; and be lodged for record in the probate office, and the time noted thereon by the judge or clerk; and the record dates from such time. If the trustee or assignee refuses to accept the trust, or neglects to do so, the probate judge appoints another.¹

Where a testator in his will does not provide for the contingency of death, incapacity or refusal of the trustee to accept, the probate judge may appoint; and where it is not otherwise provided by the will, the trustee is required to give bonds for the proper discharge of his duty.² The same provisions are extended to cases where the trustee appointed dies, or becomes incapable, or resigns, or refuses to act, the probate court appoints a new trustee and takes bond; so also where the trustee has in his hands the avails of any estate sold by him under special authority from the legislature, and he dies, etc. So also, where a trustee from absence, sickness, insanity or other cause shall become incapable, or shall neglect or refuse to perform the duties of his office, he may be removed on application, and another be appointed by the court.³ In most respects the administration of trusts in Connecticut is under the rules of the common law. Their statutes are in aid of the common law, and change but slightly indeed, if at all, their remedies.

KENTUCKY.—In Kentucky, by the new Constitu-

¹ Comp. Stat. 1854, p. 507.

² Idem, p. 490.

³ Idem, p. 491.

tion,¹ it is provided that the judicial powers of the state, as to matters of law and equity, shall be vested in one supreme court, to be styled the Court of Appeals, and courts established by the Constitution, and such other courts, inferior to the supreme court, as the General Assembly from time to time shall erect and establish.

The constitution establishes a circuit court in each county of the commonwealth; and the jurisdiction² extends to all matters, both in law and equity, within the county, and it is invested with all necessary power to carry into effect the jurisdiction given. By the Code of Practice,³ justices have jurisdiction, exclusive of the circuit court, in all actions for the recovery of money or personal property, where the value does not exceed fifty dollars. The circuit court has appellate jurisdiction from the decisions of county courts, among other things, in all cases concerning the probate of wills; and has appellate jurisdiction from quarterly courts. The quarterly courts are held by the presiding judge of the county,⁴ and have concurrent jurisdiction with the circuit courts in all civil cases where the amount does not exceed one hundred dollars.

There is established in each county of the first judicial circuit a court called the Equity and Criminal Court, and has jurisdiction in all equity and

¹ See 4th art., sec. 1, new Constitution, Rev. Stat. 1860.

² Rev. St. 1860, art. 8, chap. 27 p. 310; see also *Sams v. Stockton & Curtis*, 14 B. Monr., 233; also *Patton v. Sims*, 13 B. Monr., 398.

³ See section 29 of the Code.

⁴ See Rev. Stat. 1860, 16th art., chap. 27, sec. 3.

criminal cases,¹ like the circuit court. The judge of this equity and criminal court may transfer any civil suit brought in his court, either in law or equity, to the common law court, or to the equity docket of the circuit court.² The county court takes probate of wills in the county where the testator resides.³ But the court of chancery has jurisdiction to establish wills in the proper county.⁴ In cases of trusts and trustees, there is but little aside from the general jurisdiction of these courts as courts of equity. In their arbitration act, it is provided,⁵ that any trustee may make a submission touching the estate of the trustee; and, where the submission is made in good faith, the award shall be binding, and be entered as the judgment or decree of the court; and the fiduciary shall not be responsible for any loss, except it be caused by his own fault or neglect.

They have a statute of "Charitable Uses."⁶ Its first section defines the objects of the charity, quite similar to the 43d Elizabeth. Whoever gives land to the general public, for religious purposes, will be regarded in equity during his life, and his heirs after his death, trustee for the purposes contem-

¹ See Rev. Stat. 1860, chap. 27, sec. 1, p. 343.

² See chap. 27, sec. 2, p. 358, Rev. Stat. 1860.

³ Rev. Stat. 1860, chap. 106, sec. 27; see also *Barnes v. Edwards*, 17 B. Monr., 640.

⁴ *McCall & Wife v. Vallandigham*, 9 B. Monr., 430, also 640, 641. For original jurisdiction of Chancery to set aside wills, see *Hughley v. Sidwell's heirs*, 18 B. Monr., 260.

⁵ Rev. Stat. 1860, chap. 3, sec. 4.

⁶ Rev. St. 1860, chap. 14, sec. 1; see *Baptist Church v. Presbyterian Church*, 18 B. Monr., 640.

plated. And any person having an interest in the use or the subject of the gift, may sue in equity to have it properly executed.¹

By the second section of the charity act it is provided that no charity shall be defeated for want of a trustee, or other person in whom the title may vest; but the court of equity shall uphold the same by appointing trustees, or by taking control of the fund or property and directing its management.

In assignments for the benefit of creditors,² the trustee or assignee is not to proceed to the execution of the trust until he takes an oath in the county court, where the coveyance is properly recorded, and also, in open court, executes a covenant with good security, to be approved by the court, payable to the grantor, to the effect that he will faithfully, and in proper time, discharge the duties of trustee.

These are the particular provisions of the statute of Kentucky on the subject of trusts and trustees, so that the doctrines of the common law, as applied in courts of equity, are generally applicable in that state.

ARKANSAS.—By the Constitution of Arkansas the judicial power of the state is vested in a Supreme Court, in Circuit Courts and County Courts, etc., and when thought proper, in a Court of Chancery,³ and, until the General Assembly deems it expedient to establish a court of chancery, the Circuit Courts are

¹ See *Chambers v. Baptist Education Society*, 1 B. Monr., 220, and *ib.*, 640, 641.

² Rev. Stat., vol. 2, 1860, p. 816.

³ See Const. of Ark., art. 6, sec. 1; Dig. Stat. 1858, p. 42.

to have jurisdiction in equity,¹ subject to appeal to the Supreme Court,² which is to have jurisdiction in equity in cases of appeal from the Circuit Court.³ By statute,⁴ the Circuit Courts in the respective counties where they are held, have exclusive original jurisdiction as courts of equity, in all cases where adequate relief cannot be had by action at law.

By special enactments,⁵ a separate Court of Chancery is to be held at the seat of government by a Chancellor, with equity jurisdiction for the county, similar to that of the Circuit Court.

By special enactment,⁶ lands conveyed by purchase to trustees of religious societies, not exceeding forty acres, in trust for the use of such society, either for meeting house, burying ground, camp ground, or residence of preacher, with improvements and appurtenances, descend in perpetual succession.

And by statute,⁷ the state is not to be decreed to be a trustee by the court, because the legislature are

¹ See Const. of Ark., art. 6, sec. 6; see also *Conway v. Watkins*, Adm'r of Boyd, 1 Eng. Rep., 317.

² See art. 6, sec. 6; also *Colby v. Lawson*, 5 Ark. Rep., 303.

³ See Const., art. 6, sec. 2 and 6; also Dig. Stat., 1858, p. 301; see *William J. Marr, ex parte*, 7 Eng. Rep., 84, 87; *ex parte Barber*, librarian, etc., 7 Eng. Rep., 155; *ex parte Robins*, 15 Ark. Rep., 402.

⁴ Dig. Stat. 1858, p. 307, sec. 7; see also Rev. Stat., chap. 43, sec. 3; see also Dig. Stat., p. 218, sec. 1 and 2; *Hempsted & Conway v. Watkins*, Adm'r of Byrd, 1 Eng. Rep., 317; *Bentley's Ex'rs v. Dillard*, 1 Eng., 79; *Cummins v. Bentley*, 5 Ark. Rep., 9; *Andrews v. Fenter*, 1 Ark., 186; *Dugan v. Cureton*, 1 Ark. Rep., 31.

⁵ Acts of Jan. 15, 1855, and Jan. 13, 1857; see Session Laws and Dig. Stat. 1858, p. 239.

⁶ Dig. Stat., chap. 144, sec. 1 and 2, p. 899.

⁷ Dig. Stat., chap. 166, sec. 7, p. 1044.

competent to do justice. In all other respects, trusts are to be administered according to the principles of equity at common law, as they have no special legislation on the subject.

CALIFORNIA.—By the Constitution of California the judicial power of the state is vested in the Supreme Court, District Courts, County Courts, and Justices of the Peace.¹ The District Courts are invested with original jurisdiction in law and equity in all civil cases, where the amount in dispute, exclusive of costs, exceeds two hundred dollars: and the Supreme Court has appellate jurisdiction in all such cases.² The administration of trusts will be according to the principles of common law, as they have few statutory provisions on the subject.

MAINE.—The judicial power in Maine is vested in the Supreme Judicial Court and such other courts as the legislature may establish.³ This court has jurisdiction, among other things, for relief in cases of trusts; and also to determine the construction of wills; and whether an executor, not appointed expressly a trustee, becomes such from the provisions of the will; and in cases of doubt, to determine the mode of executing the trust; and the expediency of making changes and investments of trust property.⁴ They have a special statute regulating the trustee process, but in most respects trusts are administered as at common law.

¹ Constitution of Cal., art. 6, sec. 1, see Wood's Dig., p. 33.

² See Const. Cal., art. 6, sec. 4 and 6.

³ Const., art. 6, sec. 1, p. 36, Sev. Stat., 1857.

⁴ See Rev. Stat., 1857, chap. 77, sec. 8, p. 468.

MISSISSIPPI.—By the Constitution the judicial power of the State of Mississippi is vested in one High Court of Errors and Appeals,¹ Circuit Courts,² a Superior Chancery Court, and Court of Probate. The Superior Chancery Court has full jurisdiction in all matters of equity.³ The legislature may give the circuit court of each county equity jurisdiction in all cases where the amount does not exceed five hundred dollars, etc.³ The Probate Court has jurisdiction in all testamentary matters, etc.⁴

By statute⁵ the chancery court has full jurisdiction in all matters of equity, and of all matters properly cognizable in a court of equity.

By statute⁶ the beneficial interest of the *cestui que trust* is liable to sale on execution. Also all declarations or creations of trusts or confidence of or in any lands, tenements, hereditaments, or of slaves, must be *made and manifested* by deed in writing, signed by the party who creates or declares such trust, or by his last will in writing,⁷ and the estate of the *cestui que trust* in lands, etc., descends to the heir as real estate, unless otherwise directed by will or deed.⁸

Bills for relief, in case of trusts not cognizable by

¹ See Cons. Miss., art. 4, sec. 1, Rev. Code 1857, p. 29.

² Ib., art. 4, sec. 14, Rev. Code 1857, p. 30.

³ Ib., art. 4, sec. 16, Rev. Code 1857, p. 30.

⁴ Ib., art. 4, sec. 18.

⁵ Rev. Code, 1857, chap. 62, sec. 2, p. 540.

⁶ Ib., chap. 36, sec. 3, art. 12, p. 308.

⁷ Rev. Code 1857, chap. 46, art. 5, p. 359; see also Hutch. Code, 605, 610; see *Presley v. Rodgers*, 24 Cush., 520; *Palmer v. Cross, et al.*, 1 S. & M., 48; *Dobbs v. Prewett*, 13 S. & M., 431.

⁸ Rev. Code 1857, chap. 46, art. 7, p. 360.

courts of common law, and all other cases not otherwise provided for, must be filed within ten years after cause of action accrues, except in cases of disability; and in such cases, within the like time after disability is removed.¹

The beneficial estate, where it would have been inheritable had it been a legal estate, is made subject to dower and curtesy.² In other respects, trusts are administered according to the rules and usages of common law.

MISSOURI.—By the Constitution of Missouri the judicial powers of the state, in matters of law and equity, are vested in a Supreme Court, a Chancellor, in Circuit Courts, etc.³ The jurisdiction of the court of chancery is co-extensive with the state, and has original and appellate jurisdiction in all matters of equity, and a general control over executors, administrators, guardians and minors; subject, in all cases, to appeal to the supreme court.⁴ The circuit court, likewise, has jurisdiction in matters of equity, subject to appeal to the court of chancery, and to regulations, etc., to be prescribed by law; and this jurisdiction to be continued until inferior courts of chancery are established.⁵

It is provided by statute⁶ that where any person

¹ Rev. Code 1857, chap. 57, art. 30, p. 403.

² Rev. Code 1857, p. 468.

³ Cons. Missouri, art. 5, sec. 1, Rev. Stat. 1845, p. 38.

⁴ *Ib.*, art. 5, sec. 9 and 10, Rev. Stat. 1845, p. 39.

⁵ *Ib.*, art. 5, sec. 11, Rev. Stat. 1845, p. 39; see also Rev. Stat., p. 330, sec. 6, parts 5th and 6th.

⁶ Rev. Stat., chap. 32, sec. 1, p. 218; see *Guest v. Farley*, 19 Mo. Rep., 147.

or persons stand or be seised, or at any time thereafter shall stand or be seised, of and in any lands, tenements or hereditaments, to the use, confidence or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, covenant, contract, agreement, will, or otherwise, by any manner of means whatsoever, in every such case, all and every such person or persons, and bodies politic, that have, or hereafter shall have, any such use, confidence or trust, in fee simple, for term of life, or of years, or otherwise, or any use, confidence or trust, in remainder or reversion, shall thenceforth stand and be seised, deemed and adjudged in lawful seisin, estate and possession of and in the same lands, tenements and hereditaments, with their appurtenances, to all intents, constructions and purposes in law, of and in such like estates, as they had, or shall have, in use, confidence or trust, of or in the same; and that the estate, right, title and possession, that was or shall be in such person or persons, that were, or hereafter shall be, seised of any lands, tenements or hereditaments, to the use, confidence or trust of any such person or persons, or of any body politic, be henceforth clearly deemed and adjudged to be in him, her or them, that have, or hereafter shall have, such use, confidence or trust, after such quality, manner, form or condition, as they had before in or to the use, confidence or trust, that was or shall be in them.¹

Deeds of trust for personal property are only

¹ See preceding note.

valid as between the parties thereto, unless the possession of the trust property is delivered to, and retained by the trustee, or *cestui que trust*: or unless the trust deed is acknowledged, proved and recorded in the proper county in which the grantor resides, in the same manner that conveyances of land are required to be.¹ All declarations of trusts or confidences of any land, tenements or hereditaments, must be manifested and proved by some writing signed by the party who is or shall be by law enabled to declare such trust; or by his last will in writing:² and where any conveyance is made of any lands, tenements, or hereditaments, by which a trust or confidence may arise, or result by implication of law, such trust or confidence, shall be of the same force as the same would have been if the act had not been made.³ These are the general provisions of the statute upon the subject of trusts and trustees. Otherwise they are administered according to the rules and usages of courts at common law.⁴

GEORGIA.—There has been very little innovation by statute in the administration of trusts at common law. It is provided⁵ that all declarations or crea-

¹ Rev. Stat., chap. 67, sec. 8, p. 528.

² Rev. Stat., chap. 68, sec. 3, p. 529.

³ Rev. Stat., chap. 68, sec. 4, p. 529, 530; see also *Truesdale v. Callo-way*, 6 Mo. Rep., 605; also *Stephenson v. Smith*, 7 Mo. Rep., 610; *Thompson v. Renoe*, 12 Mo. Rep., 157; *Paul v. Chouteau*, 14 Mo. Rep., 580; *Aspinal v. Jones*, 17 Mo. Rep., 209; *Vallé v. Bryan*, 19 Mo. Rep., 423; *Romkin v. Harper*, 23 Mo. Rep., 579; *Dunnica v. Coy*, 24 Mo. Rep., 579; *Kelley v. Johnson*, 28 Mo. Rep., 249; *Cloud v. Ivie*, 28 Mo. Rep., 578.

⁴ The appointment of trustees may be shown by parol, *Gilbert v. Boyd*, 25 Mo. Rep., 27.

⁵ Hotchkiss' Stat., p. 409, sec. 2, art. 33; Cobb's Dig., p. 1128.

tions of trust or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some instrument in writing, signed by the party who is by law enabled to declare the trust, or by his last will in writing.¹ But trusts which arise by implication or construction of law are excepted out of the operation of the statute.² Also grants and assignments of trusts and confidences must be in writing, signed by the party granting or assigning the same, or by such last will or devise.³ The estate of the beneficiary is liable at law, for the debts of the *cestui que trust*, and at the death of the *cestui que trust*, the estate descends to his heir, and becomes assets, and the heir is liable to the extent thereof, for the debts of the *cestui que trust*.⁴ The power of the court over the appointment of trustees is left as at common law; and so likewise is the general administration.⁵

VERMONT.—Trusts are administered mostly according to the rules and usages at common law. By Revised Statutes of 1839, trustees appointed by will are to give bond unless the testator direct otherwise;⁶ and if the trustee or trustees neglect or refuse to do so, it is to be deemed a refusal to accept.⁷

¹ See preceding note.

² Hotchkiss' Stat., p. 409, sec. 2, art. 34; Cobb's Dig., 1128.

³ *Ib.*, sec. 2, art. 35; Cobb's Dig., 1128.

⁴ *Ib.*, p. 410, sec. 2, art. 36 and 37; Cobb's Dig., 1128.

⁵ See *Phillips v. Hines*, 33 Georgia, 163. How far the common law considered in force in Georgia, see *Vicksburgh & Jackson Railroad Co. v. Patton*, 31 Miss., 156; *Green v. Weller, et al.*, 32 Georgia, 654.

⁶ See Rev. Statutes 1839, tit. 12, chap. 55, sec. 1.

⁷ Sec. 4 of the above named act.

A trustee also may resign when the Probate Court thinks proper to permit it: and, when the trustee becomes insane, or otherwise incapable of discharging the duties pertaining to the trust, or unsuitable for the same, on notice, the Probate Court may remove him. And where the trustee dies, resigns, declines the trust, or is removed before the trust is fully executed, or the object accomplished for which he was appointed, and no provision is made by the will or deed for the appointment of a successor, the Probate Court, after due notice, may appoint a trustee or trustees to act instead thereof.¹ The trustees thus appointed are to have the same powers as the original trustees, etc., and the trust estate vests in them, and the court has power to make all necessary orders.² The courts have a common law jurisdiction in matters of equity except so far as modified by statute.

IOWA.—By the Constitution of Iowa the judicial power of the state is vested in a Supreme Court, District Court, and such other courts as may be established by the General Assembly.³ The Supreme Court has appellate jurisdiction only in chancery cases; but the district courts have original jurisdiction both in law and equity,⁴ and they are to be distinct and separate in their administrations. Declarations and creations of trusts or

¹ See sections 5, 6 and 7 of tit., *ut supra*.

² See also 8th sec. of tit. and chap., *ut supra*.

³ Constitution, art. 5, sec. 1, Rev. Stat. 1860, p. 997.

⁴ See Cons., art. 5, sec. 4 and 6; see also Rev. Stat., p. 860 and 467, sec. 2663.

powers in relation to real estate must be executed in the same manner as deeds of conveyance.¹ But such provision does not apply to estates or trusts created or resulting by operation and construction of law.²

Deeds of trust of real or personal property may be executed as securities for the performance of contracts, and sales made in accordance with their terms are valid. Or they may be treated like mortgages, and be foreclosed by action in the District Court. But no deed of trust or mortgage, with power of sale, on real estate, made after the first day of April, 1861, for security for the payment of money, shall be foreclosed in any other manner than by proceeding in the district, state, or federal courts.³

Courts of equity in this state exercise a common law jurisdiction in cases of trusts for charitable purposes.⁴ And the above seem to be all the special provisions made by statute causing the administration in cases of trusts to differ in any degree from that at common law.

INDIANA.—The judicial power of the state is vested in a Supreme Court and Circuit Courts, and such other inferior courts as may be established by

¹ See Rev. Stat. 1860, p. 390, sec. 2213.

² Rev. Stat. 1860, *ut supra*; see *McIntire v. Skinner*, 4 Iowa, 89; *Olive v. Dougherty*, 3 Iowa, 371; *Brace v. Reid*, *ib.*, 422.

³ 5 Rev. Stat. 1860, p. 653, sec. 3673. That part of the clause regulating the foreclosure of deeds of trust, etc., with power of sale on real estate, took effect July 4, 1860; see also sec. 3674, p. 653.

⁴ See at length *Miller v. Chittenden, et al.*, 4 Clark, (Iowa), 252; also, *Johnson et al.*, *Mayne et al.*, *ib.*, 180.

the General Assembly.¹ The circuit courts have jurisdiction in all civil cases or actions where the amount involved is one thousand dollars and upwards, and concurrent jurisdiction with the common pleas courts in certain specified cases where the amount is less.² The Court of Common Pleas has exclusive jurisdiction in all matters relating to the probate of wills and testaments, granting of letters testamentary, of administration and guardianship, of all matters relating to the settlement and distribution of the estates of decedents, and the personal estates of minors; all actions against executors and administrators; to authorize guardians to sell and convey the real estate of their wards, and the appointment of guardians of persons of unsound mind; the examination and allowance of the accounts of executors and administrators, and of the guardians of minors, except in special cases, etc., where concurrent jurisdiction may be given to other courts.³ It is also provided that trustees of express trusts may sue without joining with them the person for whose benefit the suit is brought; and a trustee of an express trust, within the meaning of the statute, is defined to be *any person with whom or in whose name a contract is made for the benefit of another*.⁴ It is provided by statute, that no trusts concerning lands, except such as may arise by implication of law, shall be created, unless in

¹ Const., art. 7, sec. 1, p. 59, Rev. Stat. 1852.

² Rev. Stat. 1852, 2d vol., p. 6, sec. 5; see also p. 17, sec. 4, 5, 6 and 7.

³ Rev. Stat. 1852, 2d vol., p. 17, sec. 4; see also sec. 5 and 8.

⁴ Rev. Stat. 1852, 2d vol., p. 27, sec. 4.

writing, signed by the party creating the same, or by his attorney, lawfully authorized, etc.¹ Where the trust is recorded in the proper county, it is deemed to be notice to every person; and a person beneficially interested in a trust for the receipt of rents and profits of land cannot dispose of his interest unless authorized by the instrument creating the trust. But if the trust be for a sum in gross, then the interest is assignable.² Every sale or conveyance or other act of the trustee in contravention of the trust is void.³ Purchases made by one and consideration paid by another, raise no resulting trust in favor of the one paying the consideration money, except as to creditors, etc. The provisions of the statute in this respect are like those of New York.⁴

Where money is paid in good faith to a trustee who is authorized to receive it, the payer is not responsible for the proper application of it, nor shall his right and title thereby acquired, be called in question.⁵ Upon the death of a sole or surviving trustee of an express trust, the trust vests in the court, and they appoint a successor, in whom the trust vests, and the court may accept the resignation of a trustee upon petition made, and discharge

¹ Rev. Stat. 1852, vol. 1, p. 501, chap. 113, sec. 1; see also *Elliott v. Armstrong*, 2 Blackf., 198. Resulting trusts may be proved by parol; see *Jennison, et al., v. Graves, et al.*, 2 Blackf., 440; *Blair v. Bass*, 4 Blackf., 539.

² Rev. Stat. 1852, vol. 1, chap. 113, sec. 4.

³ Rev. Stat. 1852, vol. 1, chap. 113, sec. 5.

⁴ Rev. Stat., *ut supra*, sec. 6, 7 and 8; see ante p. 31, 32.

⁵ *Ut supra*, sec. 9.

him from the trust upon such terms as justice requires.¹

So also, where trustees of an express trust have violated or attempted to violate their trust; or have become insolvent; or of whose solvency, or the solvency of their sureties, there is reasonable doubt; or for other cause in the discretion of the court having jurisdiction, they may, on petition of any person interested, after hearing, be removed by the court; and the vacancies thus accruing in express trusteeship may be filled by such court.² When there is a conveyance or devise to a trustee whose title is merely nominal, and who has no power of disposition or management of the lands, the trustee takes no title, but the use is executed in the beneficiary.³

DELAWARE.—A Court of Chancery is created by the Constitution which is to be invested with all the jurisdiction and powers of a chancery court, by the laws of the state.⁴ By statute⁵ the Court of Chancery is invested with full power to hear and decree all matters and causes in equity; and the proceedings are to be, as heretofore, by bill, answer and other pleadings; and the chancellor has power to issue subpoenas and all other process to compel defendants to answer suits there, to award commissions for taking answers and examining witnesses,

¹ Rev. Stat. 1852, vol. 1, chap. 113, sec. 10 and 11.

² *Ut supra*, sec. 12.

³ *Ut supra*, sec. 13.

⁴ Constitution of Delaware, art. 6, sec. 5.

⁵ See Revised Code of 1852, chap. 95, sec. 1, p. 320.

to grant injunctions for staying suits at law, and to prevent waste as there may be occasion, according to the course of chancery practice in England, with power to make orders and award process, and do all things necessary to bring causes to hearing, and to enforce obedience to decrees in equity, by imprisonment of the body or sequestration of the land. There appear to be no special provisions by statute regulating the administration of trust estates, and hence they are left as at common law. By the 14th section of the chancery act,¹ the Court of Chancery can order or direct that the wood growing on lands given to charity, shall be cut and sold, and the proceeds applied to repairing or improving the estate, etc.

FLORIDA.—The Circuit Court as a chancery court, is always to be open for the issuing and returning of process, making, hearing and deciding motions, presenting, arguing and deciding upon petitions, granting injunctions, and passing interlocutory orders and decrees.² The statute provides that the rules of practice in the courts of equity of the United States, as prescribed by the Supreme Court thereof, under the act of Congress of 8th May, 1792, where provision is not made by their chancery act, shall be the rules of practice of the courts of that state, when exercising equity jurisdiction. And when the rules of practice, so directed by the

¹ See Revised Code of 1852, chap. 95, sec. 14.

² Thompson's Digest of the Laws of Florida, p. 450, sec. 1; see Act Nov. 7, 1828, sec. 7, Duval, 130.

Supreme Court of the United States and the provisions of their chancery act do not apply, then the practice of the court shall be regulated by the practice of the high Court of Chancery in England.¹

All declarations or creations of trusts and confidences, etc., of real estate must be manifested and proved by some writing, signed by the party authorized to declare or create the trust, etc., excepting, however, from its operation, such trusts as are raised by operation and construction of law; and such grants or conveyances, etc., of trusts, etc., in lands, etc., must be by deed, sealed and delivered in the presence of two witnesses, by the party, etc., or his attorney, or by last will and testament.² In other respects the administration of trusts is as at common law.

NORTH CAROLINA.—Each superior court of law is also invested with chancery jurisdiction within the county, and possesses all the power and authority as a court of chancery, which the colonial court had under the laws of England: that is, a common law jurisdiction.³

No deed of trust for real or personal estate is valid as against creditors or purchasers for a valuable consideration, but from the time of registration. The register is to endorse on the deed the day on which it was presented and delivered to him

¹ Thompson's Digest of the Laws of Florida, p. 459, sec. 11; see Act Nov. 7, 1828, sec. 32, Duval, 137.

² *Ut supra*, p. 178, sec. 2 and 3; see Act Nov. 15, 1828, sec. 3, Duval, 203.

³ Rev. Code of North Carolina, 1855, p. 187, sec. 1.

for registration.¹ Infant trustees are to convey under the direction or order of the court.² The interest of the beneficiary is liable to sale on execution,³ and the purchaser holds discharged of the trust.³ In other respects the administration of trusts is according to the principles and usages at common law.

OHIO.—In Ohio, the nominal distinction between courts of law and equity has been abolished, and the term “civil action,” embraces proceedings as well in equity as at law.⁴ Remedies in equity are still administered according to the usages of courts of equity, and trusts are administered accordingly.⁵ The statutes of Ohio have left the subject matter of trusts where the common law has left it. In a few things it directs the action of the court. Whenever it appears to the court that a party to a suit is an idiot, lunatic or insane, and that no legal guardian is acting: or where the interests of the guardian are adverse, the court shall immediately appoint some suitable person to appear as trustee in his behalf, etc.⁶ So also in cases of assignments for the benefit of creditors, the statute provides that all such assignments, made by debtors to trustees, in contemplation of insolvency, with

¹ Revised Code of North Carolina, 1855, p. 245, sec. 22.

² *Ut supra*, p. 246, sec. 27.

³ *Ut supra*, p. 275, sec. 4.

⁴ Swan's Rev. Stat., Ohio, p. 625.

⁵ See *Miller and wife v. Stokeley, et al.*, where the question was whether a trust was proved by the deed being absolute upon its face, 5 Ohio (N. S.), 194.

⁶ *Ut supra*, p. 261, sec. 7.

the design to prefer one or more creditors, to the exclusion of others, shall enure to the benefit of all the creditors, in proportion to their respective demands; and such trust shall be subject to the control of the court, which may require security of the trustees for the faithful execution of the trusts; or may remove them and appoint others, as justice may require.¹

In case of trusts created by will, the statute provides,² that when two or more trustees are appointed by will to execute a trust, and one or more of them die, the survivors may execute the trust, unless the terms of the will express a contrary intention; and if such will has made no provision for the contingency of the death, incapacity or refusal of such trustee or trustees to accept or execute the trust, the court having probate of said will, may appoint some suitable person or persons to execute the trust, according to the will, and such person so appointed must give bonds with surety.²

Where a trust relating to lands situated in Ohio, is created by will, made out of the state, and such will has been duly admitted to record in Ohio, if a trustee has been appointed by such will he may execute the trust upon giving bonds to the state of Ohio in such sums, and with such sureties as shall be approved by the probate court of the county in which any part of such lands are situate, conditioned to discharge with fidelity the trusts reposed

¹ Swan's Rev. Stat. Ohio, p. 468, sec. 1, (69); passed March 14, 1853; see 51st vol. Stat., 463.

² Swan's R. S. Ohio, p. 1034, sec. 66 and 67; see also sec. 69.

in him. Bonds, however, will not be required if the testator desire that they may not be, unless from a change in circumstances, the court of probate shall think proper to require it.¹

So likewise if a trustee has been appointed by a foreign court, according to the laws of its jurisdiction, he may execute the trust by producing an authenticated record of his appointment to execute such office of trustee, and by giving bond and surety as before mentioned.²

So likewise the Court of Common Pleas of the county in which the property affected by the trust is situated, may, when necessary, on application by petition of the parties interested, appoint a trustee to carry into effect a trust created by a foreign will; which trustee must enter into bonds, as above directed, before entering upon the discharge of his duties as trustee.³

It is made the duty of the Attorney General to cause proper suits to be instituted at law and in chancery to enforce the performance of trusts for charitable and educational purposes, and to restrain the abuse thereof, either upon the complaint of others, or from his own knowledge, or under the direction of the Governor, the Supreme Court, or either house of the General Assembly; suits to be brought in his own name upon behalf of the state, either in the Court of Common Pleas of Franklin county, or the court of common pleas of any county

¹ Swan's R. Stat., p. 1034, sec. 68, 69.

² *Ut supra*, p. 1034, sec. 70.

³ *Ut supra*, p. 1034, sec. 71.

where the trust property is situated.¹ In all other respects, save some special directions in regard to administrators and executors, guardians of minors, etc., the administration of trusts is left to the rules and usages of the common law.

TEXAS.—By the Constitution of Texas, the judicial power of the state is vested in a Supreme Court, district courts, and such other inferior courts as the legislature may establish.² The district courts have original jurisdiction in all matters of divorce, and in all suits, complaints and pleas whatever, without regard to any distinction between law and equity, etc.³ Under this provision of the constitution it has been held, that the district courts have all the jurisdiction known to the common law and chancery courts of England, not incompatible with the constitution of the United States and of Texas, and the laws under them.⁴ There are no special provisions of the statute affecting the manner of creating, executing, or administering trusts, and therefore they are left as at common law.

TENNESSEE.—The judicial power of the state is vested in a Supreme Court, and such inferior courts as the legislature may establish;⁵ and among other

¹ Swan's Rev. Stat., p. 51 and 52, sec. 14; see *Hullman, et al. v. Honcomp, et al.*, 5 Ohio. (N. S.), 237.

² Oldham & White's Dig. Laws of Texas, p. 18, 19; Const., art. 4, sec. 1.

³ O. & W. Dig., etc., p. 19, Const., art. 4, sec. 10; and as to the common law jurisdiction in equity under the 10th section, see *Newson v. Chrisman*, 9 Tex. Rep., 113; see also *Johnson v. Happell*, 4 Tex. Rep., 96; *Love, et al. v. McIntyre*, 3 Tex. Rep., 10.

⁴ See *Newson v. Chrisman*, 9 Tex. Rep., 113.

⁵ See Cons. Ten., art. 6, sec. 1, Meigs & Cooper's Code of Ten., 1858, p. 42.

courts the legislature have established a Court of Chancery, with exclusive original jurisdiction of all cases of an equitable nature, where the demand exceeds fifty dollars.¹ Trustees or assignees to whom property is assigned for the benefit of creditors, etc., if exceeding the value of five hundred dollars, before entering upon the discharge of their duties, are to give bonds with two or more good sureties, in an amount equal to the amount or value of the property mentioned in the deed of assignment, payable to the state of Tennessee, conditioned for the faithful performance of all the duties, etc.: and also to take and subscribe an oath before the clerk of the county, that he will honestly and faithfully execute and perform his duties, etc., that he will make a full, true and perfect inventory of all property contained in the deed, or that may come to his hands or the hands of others, etc., for him; and that he will return and file in the office of the clerk a full and true account of all sales of said property, and of all moneys and securities taken.² And if any trustee or assignee fail or refuse to comply with these provisions, the County Court, upon application of any person interested, is to appoint a trustee or receiver, who, upon complying with such requirements, may execute the trust.³

It is also provided that any trustee appointed by deed or will may resign his office, by mere motion in open court, by and with the assent of the bene-

¹ Meigs & Cooper, etc., p. 769, art. 4279 and 4280.

² *Ut supra*, p. 402, art. 1974.

³ *Ut supra*, art. 1977.

ficiaries under the trust, or he may resign by petition in writing, presented to the court, stating the facts of the trusteeship, condition and character of the property, the state of his accounts, and offering to pass his accounts and deliver up the property; and, if, after due notice to the beneficiaries, etc., the court is satisfied that it is right and proper to permit the resignation, he may be discharged.¹

So also a trustee may be removed by the court, upon mere motion, where he is present in person, or by counsel, and offers no sufficient objection;² and he may be removed, upon application by petition by any one or more of the beneficiaries, when he fails or refuses to act as trustee; when he has violated or threatened to violate his trust; where he has removed from the state; when he is insolvent, and there is reason to fear loss on that account, or for any other good cause.³ And in case of such resignation, removal or refusal, or failure to act as such trustee, the court of chancery of the district, or circuit court of the county where the trustee resides, may appoint another in his stead, taking bond with sureties, etc.⁴ Also upon the death of a trustee a new trustee may always be appointed on application of the beneficiaries, etc.,⁵ and the court shall divest and vest title in the property, and

¹ Meigs & Cooper, etc., p. 403, art. 1979, and p. 663; art. 3650, 3651, 3652, 3654, and also p. 403, art. 1980.

² *Ut supra*, p. 664, art. 3655.

³ *Ut supra*, p. 664, art. 3656.

⁴ *Ut supra*, p. 403, art. 1980; also art. 3661, p. 664.

⁵ *Ut supra*. p. 664, art. 3663.

enforce the delivery thereof to the new trustees, etc.¹

VIRGINIA.—The judicial power of Virginia, by her Constitution, is vested in a Supreme Court of Appeals, and such superior courts as the legislature may establish, etc.² They have a court of chancery as a side of the superior court, where matters in equity are determined. Every deed of trust, conveying real estate, or goods and chattels, etc., must be duly recorded, or it will be void as to creditors or subsequent purchasers for a valuable consideration, without notice.³ Estates vested in persons by way of trust, are not to escheat to the state by reason of the alienage of the trustee. But equitable interests will escheat the same as legal, that is, so far as it would if the person holding the equitable estate, had the legal title.⁴

Trust estates are liable for the debts of the *cestui que trust*, the same as if he held the legal estate.⁵ So likewise for curtesy and dower.⁶

By a general provision of the statute, a court of equity in any suit in which it is proper to decree or order the execution of any deed or writing, may appoint a commissioner to execute the same; and

¹ Meigs & Cooper, etc., p. 664, art. 3662.

² Cons. Virginia, art. 5, sec. 1; see Rev. Code, 1849, p. 43.

³ Rev. Code, 1849, p. 508, sec. 5; see also 1 Rand., 102; 4 Leigh, 266, 349; 5 Leigh, 520, 182; 10 Leigh, 597; 2 Gratt., 182; *Christian v. Yauncy*, 2 P. & H., 240.

⁴ *Ut supra*, p. 493, sec. 26; see also 5 Munf., 117, 160; 6 Munf., 305; 3 Leigh, 492.

⁵ *Ut supra*, p. 502, sec. 16; see also 2 Leigh, 280.

⁶ *Ut supra*, p. 502, sec. 17; see 1 H. & M., 92; 3 H. & M., 321; 1 Rand., 344; 12 Leigh, 265.

the execution thereof is valid to pass, release or extinguish the right, title and interest of the party on whose behalf it was executed, etc.¹ Also, in a suit in equity, in which it appears a trustee has died, although his heirs be not parties, yet if his personal representatives and other persons interested be parties, the court may appoint another trustee in the place of the one who has died, to act either alone or in conjunction with any surviving trustee.² And the statute further,³ provides, that the personal representatives of a sole or surviving trustee shall execute the trust, or so much thereof as remains unexecuted at the death of such trustee, whether the subject of the trust be real or personal estate; unless the instrument creating the trust, direct otherwise, or some other trustee has been appointed by a court of chancery having jurisdiction.

Where any personal estate is vested in a resident trustee, and the *cestuis que trust* are non-residents, the court may, on petition or by bill in equity filed for that purpose, order the trustee, if living, or his personal representatives, to pay, transfer, or deliver the estate, etc., to the foreign trustee; or if the court think proper it may order the property to be sold or any part of it, and the proceeds to be paid over, etc.⁴

If a trustee of any real estate thinks the interest

¹ Rev. Code, 1849, p. 675, sec. 4.

² *Ut supra*, p. 675, sec. 5; 2 H. & M., 11 and 12; 4 Rand., 164.

³ *Ut supra*, p. 675, sec. 6; 11 Leigh, 342; *Nixson v. Rose*, 12 Gratt., 425.

⁴ *Ut supra*, p. 639, sec. 4 and 5.

of the beneficiary requires the estate to be sold, he may apply to the court by bill, setting forth the facts, etc., and if the court are satisfied that the interests of the beneficiary will be promoted, and the rights of no one be sacrificed thereby, they may order a sale; but the trustee must not be a purchaser at the sale, either directly or indirectly.¹

Their statute of uses and trusts is in these words: "By deed of bargain and sale, or by deeds of lease and release, or by covenant to stand seised to the use, or deed operating by way of covenant to stand seised to the use, the possession of the bargainor or covenantor shall be deemed transferred to the bargainee, releasee or person entitled to the use, for the estate or interest which such person has in the use, as perfectly as if the bargainee, releasee or person entitled to the use had been enfeoffed with livery of seisin of the land intended to be conveyed by such deed or covenant."²

There are also special provisions declaring legal and valid all conveyances of land since 1777, or which shall thereafter be made, for the use and benefit of any religious congregation as a place of public worship, burial place, or residence for a minister; and they are to be held only for such purposes, and the court may appoint trustees either when there are none, or in place of former trustees, on proper application of the proper authorities, etc.³

¹ Rev. Code, p. 535, sec. 2, 3, 4, 5 and 6.

² *Ut supra*, p. 502, sec. 14; see also post, Estate of Trustees.

³ *Ut supra*, p. 362, sec. 8 and 9.

Lands also may be conveyed to trustees for the use of Free Masons, Odd Fellows, or other benevolent associations ; and where they have been so conveyed with or without the intervention of trustees since the 31st of March, 1848, or shall after that be thus conveyed, they are to have the benefit of the ninth and eleventh sections of the act, providing for the appointment of trustees by the court,¹ and authorizing the trustees to sue for, in their own names, and recover the land or property, etc.²

Trustees are required to make yearly statements of the state of their accounts, and, together with proper vouchers, lay them before a commissioner of the court of chancery of the county or corporation wherein the instrument creating the trust was first recorded.³

MINNESOTA.—The judicial power of the state is vested in a Supreme Court, District Courts, Courts of Probate, etc. The Supreme Court has appellate jurisdiction in all cases, both in law and equity, and the district courts have original jurisdiction in all civil cases in law and equity.⁴ All equity and chancery jurisdiction of the state is exercised in all respects by the like processes, etc., as are civil proceedings, and they are denominated CIVIL ACTIONS ; and suits, applications and proceedings, commenced, prosecuted and conducted in chancery or enforced

¹ See preceding note.

² *Ut supra*, p. 363, sec. 11 and 14.

³ *Ut supra*, p. 548, sec. 7.

⁴ See Cons. Min., Comp. Stat. 1849 to 1858, by S. & H., p. 53, art. 6, sec. 1, 2 and 5.

in chancery jurisdiction, including the foreclosure and satisfaction of mortgages, are to be conducted, etc., to final decision and judgment by the like processes, pleadings, trial and proceedings, as in civil actions.¹

Uses and trusts, except as authorized by statute, are abolished, and all estates and interests in land are declared to be legal estates, cognizable as such in courts of law, except where otherwise provided by statute;² also every estate held as a use, is declared to be a confirmed legal estate, and every person, who, by virtue of any grant or assignment, is, or shall be entitled to the actual possession of lands, and the receipt of the rents and profits thereof in law or equity, are deemed to have legal estates to the same extent, etc.³ But the estate of an existing trustee, where his title is not merely nominal, but is connected with some power of disposition and management of the trust property, is excepted out of the operation of the statute; but all future dispositions of land in trust, except as provided for by statute, are to vest in the trustee no legal or equitable estate.⁴ These provisions, however, are not to extend to those trusts which arise by implication or construction of law.

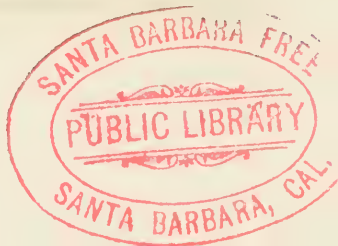
The express trusts authorized by statute are: 1. To sell lands for the benefit of creditors. 2. To sell, mortgage or lease lands, for the benefit of legatees,

¹ Compiled Statutes, 1849 to 1858, by S. & H., p. 480.

² *Ut supra*, p. 382, sec. 1.

³ *Ut supra*, p. 382, sec. 2 and 3.

⁴ *Ut supra*, sec. 5.



or for the purpose of satisfying any charge thereon.

3. To receive the rents and profits of lands, and apply them to the use of any person during the life of such person, or for any shorter term, subject to rules prescribed in the chapter on the estates in real property. 4. To receive the rents and profits of lands, and to accumulate the same for the benefit of any married woman, or for either of the purposes, and within the limits prescribed in said chapter on estates in real property. 5. For the beneficial interest of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations as to time, prescribed in the chapter on trusts, etc.¹ When an express trust is created for any purpose not enumerated above, no estate vests in the trustee; but if it directs or authorizes that which may be lawfully performed under a power, it is valid as a power in trust.²

Persons beneficially interested in a trust for the receipt of rents and profits, etc., cannot dispose of their interest unless it be for a sum in gross.

Where the trust created is not mentioned in the instrument making the conveyance, the conveyance is absolute as against the subsequent creditors of the trustee, having no notice of the trust, and also as against purchasers without notice and for a valuable consideration; but when the trust is expressed in

¹ Comp. Stat. Min., by S. & H., 1849 to 1858, p. 382, sec. 11.

² *Ut supra*, p. 383, sec. 14. In other respects, and as to powers in trust, see New York, in this chapter.

the instrument, all such conveyances in contravention of the trust to be absolutely void.¹

When the purposes for which an express trust has been created cease, the estate of the trustee ceases; and upon the death of a surviving trustee the trust does not descend to the heir or pass to the personal representative, but devolves upon the Court of Chancery, with all the powers and duties of the original trustees; and is to be executed by some person appointed by the court and under its direction.² A trustee also may resign, and, upon petition, the Court of Chancery may accept his resignation and discharge him from the trust, upon such terms as the rights and interests of the person interested in the execution of the trust may require. And the Court of Chancery, upon the petition or bill of any person interested in the execution of an express trust, and under such regulations as shall be established by the court for that purpose, may remove any trustee who shall have violated or threatened to violate his trust; or who shall be insolvent, or whose insolvency shall be apprehended; or who, for any other cause, shall be deemed an unsuitable person to execute the trust. And the Court of Chancery has full power to appoint a new trustee in the place of a trustee resigned or removed; and when in consequence of such resignation or removal, there shall be no acting trustee, the court may, in its discretion, appoint new trustees, or

¹ Comp. Stat. Min., by S. & H., 1849-1858, p. 384, sec. 20, 21 and 22.

² *Ut supra*, p. 384, sec. 24.

cause the trust to be executed by one of its officers, under its direction,¹

The court also have power to appoint a trustee to receive money to be paid to a woman upon a decree for a divorce, in trust to be invested for her support or for the support of herself and minor children.²

ALABAMA.—By the Constitution of Alabama, the Circuit Courts, or the Judges thereof are vested with equity jurisdiction, until the General Assembly shall establish a court of chancery with original and appellate equity jurisdiction.³ By statute a Court of Chancery is established and fully invested with equity jurisdiction and powers, etc.⁴

Upon the subject of uses, etc., it is declared that no use, trust or confidence can be declared of any land, or of any charge upon the same, for the mere benefit of third persons; and all assurances declaring any such use, trust or confidence, must be held and taken to vest the legal estate in the person or persons for whom the same is declared, and no estate vests in the trustee. But it is provided that nothing in the above section contained shall prevent the conveyance of real or personal property, or the issues, rents and profits thereof, to another, in trust for the use of the grantor, or of a third person, or his family, or for any other lawful purpose; but in such case the legal title vests in the trustee.⁵

¹ Comp. Stat. Min., by S. & H., 1859-1858, p. 384, sec. 25, 26 and 27.

² *Ut supra*, p. 465, sec. 22.

³ See Constitution, art. 5, sec. 8, Code 1852.

⁴ Code of 1852, p. 170.

⁵ Code, *ut supra*, p. 283 and 284, art. 1306, 1307.

No trusts of estates for the purpose of accumulation only can have any force or effect for a longer term than ten years, unless when for the benefit of a minor in being at the date of the conveyance, or, if by will, at the death of the testator; in which case the trust may extend to the termination of such minority.¹

Neither can trusts concerning lands, except such as arise by implication or construction of law, or those which may be transferred or extinguished by operation of law, be created, unless by instrument in writing, signed by the party creating or declaring the same, or his agent or attorney lawfully authorized thereunto in writing.² And no such trust, whether by legal implication or created and declared by the parties, shall defeat the title of creditors, or purchasers for a valuable consideration, without notice. But in case the instrument creating or declaring the trust is recorded in the county where the lands lie, it is deemed to be equivalent to actual notice to all persons.³

The trust is not to descend to the heir or personal representative, in case of the death of the sole or surviving trustee.⁴ In the case of a trustee of a power, with the right of selection among a certain class of objects, if he die without making the selection, equity will decree it to be for the equal benefit of all of the class; and also where

¹ Code of 1852, p. 284, art. 1310.

² *Ut supra*, p. 285, art. 1320.

³ *Ut supra*, p. 285, art. 1321 and 1322.

⁴ *Ut supra*, p. 285, art. 1323.

the disposition under an appointment or power is directed to be made to or among the children of any person, without restricting it to any particular children, it may be exercised in favor of the grandchildren, or other descendants of such person.¹ Where a power is vested in several, and one or more of them dies before the execution of it, it may be executed by the survivor. Every special and beneficial power is liable in equity to the claims of creditors, and the execution of it may be decreed for their benefit.²

The circuit court has power to remove the trustee of an express trust created by will or deed, upon the application of any party interested in the trust property, when such trustee has violated or threatened to violate his trust, is insolvent or has removed from the state. And when the trustee is removed, the court may appoint another, and require of him a bond, if necessary to protect the interest of the parties.³

When an express trust is created by will or deed, the trustee may resign on application to the register of the district where the trust property, or the most valuable portion of it, is; or in the district where the trustee resided when appointed trustee, and the register may accept the resignation and appoint another; or if such trustee die, the register, on application of a party interested, may appoint another trustee.⁴

¹ Code of 1852, p. 285, art. 1335 and 1337.

² *Ut supra*, p. 287, art. 1340 and 1341.

³ *Ut supra*, p. 496, art. 2725 and 2732.

⁴ *Ut supra*, p. 534, art. 2991, 2995 and 2996.

Upon the petition or bill of any person interested in the execution of a trust, the Court of Chancery may remove any trustee who has violated or threatened to violate his trust; or who is insolvent, or whose insolvency is apprehended; or who has removed from the state, or who for any other cause is deemed an unsuitable person to execute the trust; or the court may require such bonds as will effectually protect the interest of the parties. And the court may appoint a new trustee in the place of a trustee thus removed, or may cause the trust to be executed by one of its own officers.¹

RHODE ISLAND.—The judicial power of the state is vested in a Supreme Court, and such inferior courts as the legislature may establish; but equity jurisdiction is vested exclusively in the Supreme Court. It is enacted that the Supreme Court shall have exclusive cognizance and jurisdiction of all suits and proceedings whatsoever in equity, with full power to make and enforce all orders and decrees therein, and to issue all process therefor, according to the course of equity.²

It is provided that the Supreme Court, upon petition in equity by any married woman, filed through her next friend, may appoint a trustee of her property empowered to sue for, in his own name as trustee, and recover and hold to the use of the woman during coverture, such property; and the

¹ Code of 1852, p. 534, art. 2999 and 3000.

² See Const. of R. I., Rev. Stat. 1857, p. 30, 33, 388, sec. 8.

court has power to remove such trustee and appoint another in his stead, as in cases of other trusts.¹

The Supreme Court may at all times call any assignee of an insolvent debtor to an account; and, at their discretion, discharge him and appoint others in his place.² In case of voluntary assignments, the court has power to remove, etc., upon the application of the majority of the creditors in interest, and for cause shown.³

Trusts are left to be administered in equity, according to the usages of courts of equity in that respect.⁴

NEW HAMPSHIRE.—The Superior Court of judicature has power to hear and determine as a court of equity, in cases of grants, devises and appointments of any real or personal property for any charitable use, in all cases of trusts, etc.⁵ The said court may subject the interest of the *cestui que trust* to the payment of a judgment against him, or may prevent the transfer of such interest, by proper proceedings against him in chancery.⁶ No trusts concerning lands, excepting such as may arise or result as an implication of law, shall be created or declared, unless by an instrument signed by the party crea-

¹ See Rev. Stat. 1857, p. 318, sec. 17 and 18; see also *Johnson v. Snow*, 5 R. I. Rep., 72.

² Rev. Stat., p. 496, sec. 40.

³ See act of Jan. Session 1856, schedule 71, sec. 1; see also, *In Matter of Durfee*, 4 R. I. Rep., 406; see further, *Eaton v. Tillinghast, Trustee, et al.*, 4 R. I. Rep., 276.

⁴ See *Green, et al. v. Mumford, et al.*, 4 R. I. Rep., 313. In *Matter of Durfee*, 4 R. I. Rep., 406, remarks of Ames, C. J.

⁵ Rev. Stat. N. Hampshire, 1853, p. 434, sec. 9.

⁶ *Ut supra*, p. 436, sec. 19 and 20.

ting the same, or by his attorney.¹ Every trustee to whom any real or personal estate is devised in trust for any minor or other person, by will, must give bond to the judge of probate, with sufficient sureties, in such sum as the judge may order, conditioned: first, that he shall file in the probate office a true inventory of the real estate, goods, chattels, rights and credits so devised, at such time as the judge may order; secondly, that he will account annually with said judge, for the annual income and profit thereof; thirdly, that at the expiration of said trust, he will settle and adjust his accounts with the judge, and pay and deliver over all balances, money and property, with which he has been intrusted; and, fourthly, that he will faithfully execute such trust according to the true intent of the devisor. But the bond may be omitted when the testator requests it, or when the parties interested, being of age and capable, shall also request it, so long as the trustee shall continue faithful, etc.²

When the trustee shall refuse or neglect to execute such bond, he will be considered to have declined the acceptance of the trust. And a trustee so appointed, or appointed by the judge, in pursuance of the directions hereafter named, may, upon request in writing to the judge, be permitted to resign his trust, if the judge shall think proper. And if a trustee appointed by will decline accept-

¹ Rev. Stat. New Hampshire, p. 290, sec. 13.

² *Ut supra*, p. 426, sec. 1 and 2.

ing the trust, and the will make no provision for perpetuating it, or if he shall die, or resign, or be removed, the judge may, after notice to the parties interested, appoint a trustee to administer such trust.¹ The trustees so appointed are to give bonds, etc., the same as though they had been appointed by the testator in the will; and the estate also vests in them in the same manner.²

Whenever a trustee becomes disqualified for the discharge of the trust, by becoming insane, or otherwise incapable or evidently unsuitable for the execution of the trust; or whenever he shall neglect or refuse to comply with the provisions of the statute on that subject, after notice to him, and other parties interested, he may be removed by the judge. And any trustee appointed by the judge shall demand and receive of the original trustee all property, real and personal, which came to his hands as such, etc.³

The judge, on application, may order the sale of trust property, and an investment of the proceeds; and he may grant license to the executor or administrator of a deceased trustee to convey to the beneficiary, if proper, etc.⁴

OREGON.—The statutes of Oregon provide that a trustee of an express trust may sue without joining with him the person for whose benefit the action is brought; and they define a trustee of an express

¹ Rev. Stat. New Hamp., p. 426, sec. 3, 4 and 5.

² *Ut supra*, p. 426, sec. 6.

³ *Ut supra*, p. 426 and 427, sec. 7 and 8.

⁴ *Ut supra*, p. 427, sec. 9 and 10.

trust to be any person with whom, or in whose name, a contract is made for the benefit of another.¹ But in suits against trustees, claims of the beneficiary may be set off in the same manner as they would if the action were against them.² There appear to be no other statutes or decisions upon the subject of trusts and trustees, in Oregon.

SOUTH CAROLINA.—All declarations and creations of trusts in South Carolina must be in writing, except such as arise by implication, or construction of law, etc.³ So, likewise, assignments of trusts must be in writing. So, likewise, the interest of the *cestui que trust* is liable to execution,⁴ and becomes assets in the hands of the heir, etc.⁵ A minor trustee, by order of a court of chancery, may convey lands; and he may be compelled to convey.⁶

Trustees may surrender or resign their trust by permission of the court, when the *cestuis que trust* are willing, and the court may appoint others in their place; and the newly appointed trustees are invested with the rights, powers, titles, etc., of the original trustees.⁷ In other respects trusts are administered as at common law.

LOUISIANA.—In Louisiana the law of trusts is regulated by their Civil Code published in 1838. It is provided therein that substitutions and *fidei*

¹ Stat. of Oregon, 1855, p. 82, sec. 5.

² *Ut supra*, p. 145, sec. 7.

³ 2 vol. Stat., p. 526.

⁴ 2 vol. Stat., p. 527, sec. 9 and 10.

⁵ 2 vol. Stat., p. 527, sec. 10.

⁶ 2 vol. Stat., p. 546 and 547.

⁷ Vol. 5, p. 277 and 278.

commissa are, and remain, prohibited.¹ Every disposition by which the donee, the heir or legatee, is charged to preserve for, or return a thing to a third person, is null, even with regard to the donee, the heir or legatee.

In consequence of this article, the trebellianic portion of the civil law, that is to say, the portion of the property of the testator, which the instituted heir had a right to retain, where he was charged with a *fidei commissa*, or fiduciary bequest, is no longer a part of the law of Louisiana.² It is held, however, that nothing in the laws of Louisiana prohibits a man from transferring property to another, to be held for his use; and where the person for whose use the trust is created, consents and agrees that it shall stand in the name of another for his benefit or use, that it is neither a substitution or a *fidei commissa*, and therefore may stand.³ But where it was provided by will that the property of the estate was to remain in the hands of the executors until the testator's children or heirs should arrive at the age of majority, it was held that it was the same as to authorize them to hold, keep and preserve it for, and return it to them : and that being

¹ See Civil Code, 1838, art. 1507, p. 229.

² Civil Code, art. 1507; see *Hope v. State Bank*, 4 La. Rep., 213; *Arnaud v. Tarbe, et al.*, 4 La. Rep., 502. See remarks of Mathews, Justice, in delivering the opinion of the court. *Duplessis v. Kennedy, et al.*, 6 La. Rep., 231. See argument of counsel and numerous authorities cited.

³ See *Hope v. State Bank*, 4 La. Rep., 213; see also *W. B. Partee, Trustee, etc. v. Succession of H. R. W. Hill, Mrs. Mary R. Lester, Intervenor*, 12 La. An., 767.

so, it was *fidei commissa*, or trust, and prohibited by law.¹

MARYLAND.—There appear to be no provisions by statute in Maryland, changing the law of trusts as administered by courts of equity. The decisions of their courts are mostly in accordance with well established principles at common law, and the authority of the court to remove and appoint trustees is left to be administered as at common law.

SECTION IV. CONSTITUTION OF TRUSTEES BY AN ACT OF THE LEGISLATURE.

The power of the legislature to appoint trustees does not admit of any question. They could not confer this power upon the courts did they not possess it themselves. This power is frequently exercised by them in the legislative organization of various public institutions for civil, moral, religious and charitable purposes; such as the institution of boards of public works, or commissioners for various purposes; as trustees of asylums for the blind, the deaf, the insane, etc.: and in the incorporation of societies for social, moral, literary, scientific and religious purposes, the trustees are not unfrequently constituted by the incorporating act, and provisions are made therein for their continuance.

¹ Claque's Widow v. Claque's Ex'rs., 13 La. Rep., 7. For the law of Louisiana, on the subject of trusts, see Civil Code, title 2, "Of donations *inter vivos* and *mortis causa*," chap. 4. "Dispositions reprobated by law," page of the Code, 229. See also Partee, etc. v. Lester, etc., 12 La. An., 767; Harper v. Stanborough, 2 La. An., 381; Succession of Franklin, 7 La. An., 412.

There are a class of trusts, which, in this country, will fail unless the legislature interfere and provide for their execution. It embraces those cases which, in England, vest the right in the King as *parens patriæ*; as, where there is a gift to charity, and no charity is appointed; or that which is appointed is superstitious, or illegal, etc.;¹ or where the objects are so indefinite or uncertain that the court cannot determine its execution. In these and the like cases, the people, through their legislatures, can, if they wish, exercise as plenary a jurisdiction as the King in England.

SECTION V. THE CONSTITUTION OF TRUSTEES BY IMPLICATION AND CONSTRUCTION OF LAW.

Lord Coke described the nature of a use or trust, thus: "It is a trust or confidence reposed in some other, which is not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person, touching the land."² So the *cestui que use* has neither *jus in re*, nor *jus ad rem*. Bacon defines a use to be, "*Usus est dominium fiduciarum*;"³ that is, an ownership in trust. Chief Baron Gilbert, says:⁴ "A use is where the legal estate of lands is in a certain person, and a trust is

¹ See *Williams v. Williams*, 4 Seld., 525; *Buchanan v. Hamilton*, 5 Ves., 722; *Ayres v. The M. E. Church*, 3 Sandf. S. C. Rep., 351; *Owens v. The Missionary So. of the M. E. Church*, 14 N. Y., 384; *Beckman v. The People*, 27 Barb. S. C., 263.

² Coke Lit., 272, *b*; *Chudleigh's case*, 1 Co. Rep., 121, *a, b*.

³ Bacon. Read., 9.

⁴ Gilb. on Uses, p. 1.

also reposed in him and all persons claiming in privity under him, concerning those lands, that some person shall take the profits; and be so seised or possessed of that legal estate to make and execute estates according to the direction of the person or persons for whose benefit the trust was created." It has already been shown that a trust is a use which is not executed by the statute, and therefore comes under the definition of a use, as above set forth.

This trust or confidence arises frequently as an implication of law; that is, under the circumstances, the law presumes there was an understanding between the parties, by which the holder of the legal interest or estate in the property was to hold it in trust, or for the use of another; and, acting upon this presumption, the law converts the legal holder into a trustee. Thus, where one takes the conveyance of property in his own name while the consideration therefor is paid by another, in the absence of all proof to the contrary, the law presumes it was the understanding between the parties that the property should be held for the benefit of the one paying the consideration money, and therefore converts the grantee into a trustee;¹ and

¹ *Lounsbury v. Purdy*, 4 Smith, 515; *Elliott v. Armstrong*, 2 Blackf., 198; *Jennison v. Graves*, *ib.*, 441; *Prevo v. Walters*, 4 Scam., 35; *Powell v. Powell*, 1 Freem. Ch., 134; *Talliaferro v. Talliaferro*, 6 Alab., 404; *Pinney v. Fellows*, 15 Verm., 525; *Bank of U. S. v. Carrington*, 7 Leigh, 566; *Page v. Page*, 8 N. H., 187; *Brock v. Savage*, 31 Penn. St. Rep., 410; *Fillman v. Divers*, 31 Penn. St. Rep., 429; *Barnett v. Dougherty*, 32 Penn. St. Rep., 371; *Kellum v. Smith*, 33 Penn. St. Rep., 158; *Smyth v. Oliver*, 31 Alab., 39; *Kelley v. Johnson*, 28 Miss., (7 Jones,) 249; *Northcraft v.*

although the conveyance be absolute upon its face, parol proof will be admitted to establish the fact of payment by another, and such other circumstances as will convert the grantee into a trustee.¹ So also where the consideration, for the purchase of land conveyed to a third person, is paid in part with the money of the husband, and in part by that of the wife, not reduced to possession by the husband, the use enures to the benefit of the husband and wife in proportion to the amounts respectively paid by each.² But the proof of payment by the *cestui que trust*, must be clear and conclusive.³ And a trust only results when the money is actually paid at the

Martin, *ib.*, 469; *Dunnica v. Doy*, 24 Miss., (3 Jones,) 167; *Rankin v. Harper*, 23 Miss., 579; *Orton v. Knab*, 3 Wis., 576; *Farley v. Blood*, 10 Foster, 354; *Lynch v. Cox*, 23 Penn. St. Rep., (11 Har.), 265; *Williams v. Van Tuyl*, 2 Ohio, (N. S.), 336; *Jackson v. Sternbergh*, 1 Johns. C., 153; *Jackson v. Mills*, 13 Johns., 463; *Jackson v. Morse*, 16 Johns., 197; *Harder v. Harder*, 2 Sand. Ch., 17; *Gomez v. Tradesman's Bank*, 4 Sand., 102; *Reed v. Fitch*, 11 Barb., 399.

¹ *De Peyster v. Gould*, 2 Green's Ch., 474; *Page v. Page*, 8 N. H., 187; *Dismukes v. Terry*, Walk., 197; *Farrington v. Barr*, 36 N. H., 86; *Fausler v. Jones*, 7 Ind., 277; *Rogan v. Walker*, 1 Wis., 527; *Whiting v. Gould*, 2 Wis., 552; *Nichols v. Thornton*, 16 Ill., 113; *Boyd v. McLean*, 1 J. Ch., 582; *Malin v. Malin*, 1 Wend., 625; *Jackson v. Matsdorf*, 11 Johns., 91; *Livingston v. Livingston*, 2 Johns. Ch., 537; *Mann v. Mann*, 1 Johns. Ch., 231; *Hosford v. Merwin*, 5 Barb., 51; *Artcher v. McDuffie*, 5 Barb., 147; *Day v. Roth*, 4 Smith, 448.

² *Hall v. Young*, 37 N. H., 134; same principle see *Wallis v. Beauchamp*, 13 Tex., 303; *Smith v. Strahan*, 16 Tex., 314; *McCammon v. Pettitt*, 3 Sneed, 242; *Tebbetts v. Tilton*, 11 Foster, 273; *Pensenneau v. Pensenneau*, 22 Miss., 27; *Sheldon v. Sheldon*, 3 Wis., 699; *Neill v. Keese*, 13 Tex., 187.

³ *Greer v. Baughman*, 13 Md., 257; *Olive v. Dougherty*, 3 Iowa, 371; *Malin v. Malin*, 1 Wend., 625; *Jackson v. Bateman*, 2 Wend., 570; *Getman v. Getman*, 1 Barb. Ch., 499; *Freeman v. Kelley*, Hoff., 90.

time of the purchase.¹ Neither does a trust result in favor of a parent who purchases land in the name of his child, for the law presumes an advancement was intended.² And if the party claiming the resulting trust has paid no money, he cannot show by parol evidence that the purchase by absolute deed and for a valuable consideration, was made for his benefit.³ But where B had verbally agreed to enter the land, and advance the purchase money for C, who had a settler's claim, and deed back one half of the land to C, on his refunding his share of the purchase money; but subsequently, on the tender of the money by C, refused to convey to him, it was held that a resulting trust arose which took the agreement out of the statute of frauds, and converted B, *pro tanto*, into a trustee.⁴ Any consideration paid by the grantee is sufficient to rebut the presumption that a trust was intended,⁵ or if a good consideration is stated in the deed.⁶

¹ *Smith v. Garth*, 32 Alab., 368; *Gee v. Gee*, 32 Miss., (3 George,) 190; *Whitney v. Gould*, 2 Wis., 552; *Gee v. Gee*, 2 Sneed, 395; *Bolsford v. Burr*, 2 Johns. Ch., 405; *Steere v. Steer*, 5 Johns. Ch., 1; *Roggers v. Murray*, 3 Paige, 390; see *Ross v. Hageman*, 2 Edw., 373; *Pattison v. Horn*, 1 Grant's cases (Pa.), 301; *Barnet v. Dougherty*, 32 Penn. St. R., 371.

² *Gunthrie v. Gardner*, 19 Wend., 414; *Gee v. Gee*, 32 Miss., (3 George,) 190; *Smith v. Strahan*, 16 Tex., 314; see also *Farley v. Blood*, 10 Foster, 354; *Welton v. Divine*, 20 Barb., 9; *Shepherd v. White*, 11 Tex., 346; (but see *Valle v. Bryan*, 19 Miss., 423;) *Astreen v. Flanagan*, 3 Edw., 279; *Jackson v. Matsdorf*, 11 Johns., 91; *Parsons v. McIntyre*, 5 Barb., 424; *Livingston v. Livingston*, 2 Johns. Ch., 537; *Jenks v. Alexander*, 11 Paige, 619.

³ *Irwin v. Ivers*, 3 Ind., 308; see also *Smith v. Smith*, 27 Penn. St. Rep., 180.

⁴ *Brooks v. Ellis*, 3 Iowa, 527.

⁵ *Farrington v. Barr*, 36 N. H., 86.

⁶ *Orton v. Knab*, 3 Wis., 576.

Upon a similar principle of raising a trust in favor of the one paying the consideration, A was owing B, and executed a mortgage upon his land to secure the debt, and B authorized A to sell the land to pay it. B died; and his administratrix C agreed with A that a decree should be rendered by virtue of which the land was sold and purchased by the administratrix, who authorized A to sell the land to pay the debt. A, having sold enough for that purpose, claimed the residue for himself, and his claim was sustained by the court.¹ Upon the same principle, where the agent, acting in his capacity as such, purchases land and takes the deed in his own name, he holds the title as trustee for his principal.² Here, likewise, is involved the principle of constructive fraud, by which a trust arises by construction of law. So, likewise, where an attorney was employed to foreclose a mortgage, and took a conveyance in his own name, he was held to be trustee of the title for his client.³ Or where a trustee diverts the trust funds to the purchase of land, and takes a deed in the name of a third person, a trust results in favor of the *cestui que trust*.⁴ But no resulting trust can be raised in opposition to the written agreement of the parties, on which the con-

¹ Langhorne v. Payne, 14 B. Monr., 624.

² Follansbe v. Kilbreth, 17 Ill., 522; Sheldon v. Sheldon, 3 Wis., 699; ante p. 32, 33.

³ Giddings v. Eastman, 5 Paige, 561; Anstice v. Brown, 6 Paige, 448.

⁴ Russel v. Allen, 10 Paige, 249; Getman v. Getman. 1 Barb. Ch., 499; ante p. 33.

veyance was founded.¹ So also a resulting trust may be rebutted by proof that the title was put in the grantee for the purpose of defrauding creditors, or for the purpose of protecting the property from the creditors of the one who furnished the purchase money ;² but a trust will be raised in favor of the creditors.³

In New York, Michigan, Wisconsin, and some of the other states,⁴ resulting trusts do not arise in favor of the one paying the consideration money, and permitting the conveyance to be made in the name of a third party. But if the conveyance is made to another person, without the knowledge and consent of the party paying the money, or if the purchase be made with funds held in a fiduciary capacity, a trust results.⁵ But in such cases, where the property is purchased with the funds of the one who consents to have the conveyance made to another, a trust results to the creditors of the one paying the consideration to the extent that may be necessary to satisfy their just demands.⁶

¹ *St. John v. Benedict*, 6 Johns. Ch., 111; *White v. Carpenter*, 2 Paige, 217; *Squire v. Harder*, 1 Paige, 494; *Rathbun v. Rathbun*, 6 Barb., 98; *Leggett v. Dubois*, 5 Paige, 114; *Ring v. McCoun*, 6 Seld., 268; *Graves v. Graves*, 9 Foster, 129.

² *Baldwin v. Campfield*, 4 Halst. Ch. Rep., 891; *Proseus v. McIntyre*, 5 Barb., 424; *Leggett v. Dubois*, 5 Paige, 114.

³ *Dnnnica v. Coy*, 24 Miss., (3 Jones,) 167.

⁴ See ante, the various states in section 3 of this chapter; also ante p. 32.

⁵ N. Y. Rev. Stat., vol. 3, p. 15, sec. 51, 52, 53; see also Comp. laws of Mich., vol. 2, p. 825, art. 2637, sec. 7, 9; *Bodine v. Edwards*, 10 Paige, 504; *Norton v. Stone*, 8 Paige, 222; *Ostrander v. Livingston*, 3 Barb. Ch., 416.

⁶ N. Y. Rev. Stat., vol. 3, p. 15, sec. 52; Compiled laws of Mich., vol. 2, p. 825, art. 2638, sec. 8.

In all cases where trust moneys placed in the hands of others in a fiduciary capacity, have been invested in property, without the consent of the beneficiary, a trust results; and the purchaser becomes a trustee, unless the *cestui que trust* elect to take the money instead of the property;¹ and the *cestui que trust* may pursue the property into the hands of all subsequent purchasers, with notice, and convert them into trustees.² And this right of pursuit will not end until the means of ascertainment fails;³ for the law will not permit one, in the discharge of his legal duty to another, to place himself in a position where there is a conflict between self-interest and integrity.⁴ But the reason does not apply where one, having notice of the trust, buys the property from one who purchased the same innocently; for he takes the title which the innocent purchaser had, discharged of the trust.⁵

¹ *Torry v. Bank of Orleans*, 9 Paige, 663; also *Van Epps v. Van Epps*, *ib.*, 237, 241; *Wormley v. Wormley*, 8 Wheat., 421; *Prevost v. Gratz*, 6 Wheat., 481; *Hawley v. Cramer*, 4 Cow., 736; *Seaman v. Cook*, 14 Ill., 501; *Chapin v. Weed*, Clark, 464; *Quackenbush v. Leonard*, 9 Paige, 334; *Den v. McKnight*, 6 Halst., 385; *Caldwell v. Carrington*, 9 Pet., 86.

² *Adair v. Shaw*, 1 Scho. & Lefr., 862; *Sanders v. Dehew*, 2 Vern., 271; 2 Fonbl. Eq., 152; *Hollister Bank of Buffalo v. Camp*, Gen. T. June 1857; *Peebles v. Reading*, 8 S. & R., 495; *Massay v. McIlwayne*, 2 Hill's Eq., 426; *Wright v. Darue*, 22 Pick., 55.

³ *Thompson's Appeal*, 22 Penn. St. Rep., 16; *Goepp's Appl.*, 15 Penn. St. R., 428; *Seaman v. Cook*, 14 Ill., 505.

⁴ *Wormley v. Wormley*, 8 Wheat., 421; *Van Epps v. Van Epps*, 9 Paige, 237; *Hawley v. Cramer*, 4 Cowen, 717; *Slade v. Van Vechten*, 11 Paige, 21; *Ackerman v. Emott*, 4 Barb., 626.

⁵ *Boggs v. Varner*, 6 W. & S., 469; *Bracken v. Miller*, 4 W. & S., 102; *Griffith v. Griffith*, 9 Paige, 315; *Fletcher v. Peck*, 6 Cranch, 36; *Lacy v. Wilson*, 4 Munf., 313; *Boon v. Chiles*, 10 Pet., 177; except the original trustee, who is charged with the trust, *Church v. Church*, 25 Penn. St., 279; *Bovey v. Smith*, 1 Vern., 149; 1 Cruise's Dig., tit. 12, chap. 4, sec. 14.

Upon the same principle, the trustee, as a general rule, is not permitted to buy the property of the *cestui que trust*.¹

When money belonging to another, where the fiduciary relation does not exist, is used in the purchase of property, no trust results; and the purchaser or holder of the property does not become trustee.²

Where trust and confidence are reposed by one party in another, and such other accepts the confidence, etc., equity will convert him into a trustee whenever it is necessary to protect the interest of the confiding, and do justice between them.

An attorney sustains such a confidential relation to his client, that, in transactions between them, trusts by implication and construction of law are quite liable to arise. The client employs the attorney because of the confidence he has in his integrity and skill in managing his affairs and protecting his interests: and this confidence gives the attorney a very strong influence over his client's actions. And, besides the superior legal knowledge of the solicitor, and the intimate knowledge he has of his client's situation, together with that confidence which he

¹ Pratt v. Thornton, 28 Maine, 355; Wormley v. Wormley, 8 Wheat., 421; Conger v. Ring, 11 Barb., 356; Dobson v. Racey 3 Sand. Ch., 60; ante, 144; see also as between attorney and client, Giddings v. Eastman, 5 Paige, 561; Evans v. Ellis, 5 Denio, 640; Wallace v. Loubat, 2 Denio, 607; Wilson v. Moran, 3 Brad., 172. The same principle is applicable to all standing in relations of confidence or trust; see ante p. 131 *et seq.*

² Campbell v. Drake, 4 Ired. Eq., 94; Ensley v. Ballantine, 4 Humph. 233; Pascoag Bank v. Hunt, 3 Edw., 583; but see 4 Edw., 219.

possesses, gives him great power to avail himself, if he is so disposed, of his client's credulity, liberality or necessity. For these and similar reasons, the law watches over the transactions between parties in this relation with exceeding jealousy:¹ and it throws the burden of establishing the perfect fairness of all such transactions upon the attorney.² This is in accordance with the general rule, that he who bargains in a matter of advantage with a person placing confidence in him, is bound to shew that a reasonable use has been made of that confidence.³ And this doctrine is not confined to those cases where their transactions respect the rights of property in controversy, and in which the attorney is engaged; but the prohibition may be extended after the particular relation of attorney and client has ceased, and it has been held to be perpetual.⁴

The principles upon which these doctrines are based, underlie all those fiduciary relations which necessarily exist in society, and are more or less

¹ *Wright v. Proud*, 15 Ves., 138; *Jennings v. McConnel*, 17 Ill.; *Starr v. Vanderhyden*, 9 Johns., 258; *Ford v. Harrington*, 16 N. Y. Rep., 285; *Evans v. Ellis*, 5 Denio, 640; *Barnard v. Hunter*, 39 Eng. L. and Eq. Rep., 569.

² *Story's Equity Jurisprudence*, sec. 113; *Ford v. Harrington*, 16 N. Y. Rep., (2 Smith.) 285; *Sug. V. and P.*, Vol. III., p. 238, 10th ed.; *Montesque v. Sandys*, 18 Ves., 302; *Hunter v. Atkins*, 3 M. & K., 113; *Hooper v. Burnett*, 26 Miss., 428; *Evans v. Ellis*, 5 Denio, 640; *Scoby v. Ross*, 5 Ind., *Holman v. Loynes*, 27 Eng. L. & Eq. Rep., 168.

³ *Ante*, p. 138; also *Hawley v. Cramer*, 4 Cow., 717; *Evans v. Ellis*, 5 Denio, 640; *Wilson v. Moran*, 3 Brad., 172; *Ford v. Harrington*, 16 N. Y. Rep., 285.

⁴ See *Henry v. Raiman*, 25 Penn. St. Rep., 354; also *Wood v. Downes*, 18 Ves., 127; *Stockton v. Ford*, 11 How. U. S., 232; *Dobbins v. Stevens* 17 S. & R., 13.

stringently applied according to the circumstances of each particular case.¹

Thus in transactions between principals and their agents, guardians and their wards, trustees and their *cestuis que trust*, such confidential relations exist, and such opportunities for exercising an undue influence occur, that the court feels constrained to watch them with extreme jealousy; and where a gift is taken by the agent from his principal, or by the guardian from his ward, or by the trustee from his *cestui que trust*, or where property is acquired by them in any manner in such relation, the court will impose upon the party the burden of proof to show that he has dealt with his principal, ward or *cestui que trust*, exactly as a stranger would have done.²

Executors and administrators hold the property of their testators or of the intestate, in their hands, in trust for the payment of debts and legacies, and for the application of the surplus according to the will of the testator, or the statute of distribution: and courts of equity proceed in cases of this kind as in the execution of trusts. Consequently, like trustees, they are prohibited from dealing with the estate of their testators or intestates on their own

¹ See ante, p. 143, and remarks of Supreme Court of U. S. there quoted; Gardner v. Ogden, 22 N. Y. Rep., (8 Smith,) 327; Lake v. Ranney, 33 Barb., 49.

² Hunter v. Atkins, 3 M. & K., 113; Michoud v. Girod, 4 How. S. C., 503; N. Y. Central Ins. Co. v. National Prot. Ins. Co., 14 N. Y. Rep., (4 Kern,) 85; Vanderpool v. Kearnes, 2 E. D. Smith, 170; Dunlop v. Richards, 2 E. D. Smith, 181; Pennock's Appeal, 14 Penn. St. Rep., 446; Jones v. Smith, 33 Miss., 215; see ante, 144, *et seq.*

account.¹ Executors and administrators can not be permitted to purchase for themselves, that property which the law makes it their duty to sell, without violating that principle of public policy which prohibits the same individual to combine the character of vendor and purchaser. This rule is based upon our recognized obligation from placing ourselves in relations which ordinarily excite a conflict between integrity and self-interest. The disability to purchase in such cases, is a consequence of that relation between the parties which imposes on the one the duty to protect the interests of the other; from the faithful discharge of which duty his own personal interests may withdraw him. In this conflict of interest, the law wisely interferes. It is true that a sense of duty may prevail over motives of self-interest; but it is equally true that the dictates of self-interest may exercise a predominating influence and supercede those of duty. Experience has taught that it is not well to subject man to so severe a trial. The law based upon such experience therefore, prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another: and also from purchasing on account of another that which he sells on his own account.²

¹ *Wormley v. Wormley*, 8 Wheat., 421; *Shannon v. Marmaduke*, 14 Texas, 217; *Moor v. Moor*, 1 Seld., 256; *Van Horn v. Fonda*, 5 Johns. Ch., 388; *Hatch v. Hatch*, 9 Ves., 297; *Ayliff v. Murry*, 2 Atk., 59; *Pratt v. Thornton*, 28 Maine, 355; *Evans v. Ellis*, 5 Denio, 640.

² See remarks of the Judge delivering the opinion of the Supreme Court of the United States in case of *Michoud v. Girod*, 4 Howard S. C. Rep., 503; see ante, 143, *et seq.*; *Abbot v. American Hard Rubber Co.*, 33 Barb.

It is impossible to enumerate all the cases where the law raises an implied trust between parties standing in a confidential relation to each other. The law is very astute in discovering such relation, and exact in requiring fidelity in it. Thus, where a debtor has deposited in the hands of his surety, a note on a third person, as an indemnity against liability, and the surety transfers such note to another person who is cognizant of the trust, the latter person becomes a trustee by implication of law for the benefit of the creditor, as to the money collected on such note,¹ and where an executor has, under a decree of foreclosure of a mortgage due to the estate, purchased the premises, he holds in trust; and if he sells the premises at a large advance, such excess will belong to those for whose benefit the mortgage was held.² But it is held that the financial officer of a bank is not disqualified from purchasing for his own benefit, property pledged to the bank for a debt.²

Where an estate has been devised to a trustee, and he refuses to accept the trusts under the will, whereby the legal estate vests in the heir, such

S. C., 579; *Schoonmaker v. Van Wyck*, 31 Barb. S. C. Rep., 457; *Dobson v. Racey*, 8 N. Y. Rep., 216; *Cumberland Coal and Iron Co. v. Sherman*, 30 Barb. S. C., 553.

¹ *Martin v. Bank*, 31 Alab., 115; see also *People v. Houghtaling*, 7 Cal., 348; *Coffee v. Crouch*, 28 Miss., (7 Jones,) 106; *Northcraft v. Martin*, *Ib.*, 469; *Wallis v. Beauchamp*, 15 Texas, 303; *Wallace v. Bowens*, 28 Verm., 638; *Easterbrooks v. Tillinghast*, 5 Gray, 17; *Tracy v. Tracy*, 3 Brad., 57; *Beck's Ex'rs v. Graybill*, 28 Penn. St. Rep., 66.

² *Schoonmaker v. Van Wyck*, 31 Barb. S. C. Rep., 457; see also *Cumberland Coal and Iron Co. v. Sherman*, 30 Barb. S. C. Rep., 553; see also *Gardner v. Ogden*, 22 N. Y. Rep., 327.

heir will become a trustee by implication and construction of law.¹ So, also, where it is evident from the will, that the testator intended that the heir-at-law, or other person, should take the legal estate for the benefit of the real devisee, although no formal words of devise in trust are used, the heir or other person will be deemed to take in trust for such devisee.² Wherever the objects of the testator's bounty and the benefit intended are clear, a trust is created, whoever may hold the property bequeathed³; so, where land has been conveyed by an absolute and unconditional deed to secure a debt due from the grantor to the grantee, the law will imply a resulting trust, and constitute the grantee a trustee for the grantor, for any surplus that may arise on the sale of such land.⁴ So, also, where the husband takes a deed in the name of the wife under the belief that on her death, the legal title would vest in himself, equity will give such an effect to the deed, by raising an implied trust.⁵ A parol agreement to purchase land which is to be sold on execution, and to hold it for the benefit of the execution debtor, constitutes a valid trust, and is not within the Statute of Frauds, as an agreement for the sale of lands.⁶ In cases of this character a trust

¹ *Cushney v. Henry*, 4 Paige Ch. Rep., 345.

² *Hoxie v. Hoxie*, 7 Paige Ch. Rep., 187.

³ *McIntyre Poor School v. Zan. Canal and Manuf. Co.*, 9 Ham., 203; *Hertell v. Van Buren*, 3 Edw. Ch., 20; *Magruder v. Peter*, 11 Gill. & J., 217.

⁴ *Richardson v. Woodbury*, 43 Maine, 206.

⁵ *Wallace v. Bowens*, 28 Verm. Rep. 638.

⁶ *Soggins v. Heard*, 31 Miss., (2 Geo.), 426.

is raised *ex maleficio*, by which the fraudulent procurer of the legal title is turned into a trustee to get at him.¹ Where a husband, with the consent of his wife, sold her lands under a promise to invest the proceeds in other lands, but took the deed in his own name, and soon after died, it was held that the husband took the lands clothed with a resulting trust in favor of the wife.² •

In the case of *Sieman v. Austin et al.*³ the plaintiff had brought her action to restrain the prosecution of an ejectment by the defendant Austin, and to have the Sheriff's deed, under which the defendant claimed, to be delivered up to be cancelled. The facts in the case were substantially as follows: In March, 1847, the parents of the plaintiff, while she was an infant, and without any knowledge of the transaction on her part, wishing to invest, for her, the sum of \$1,000, negotiated for the conveyance of the land in dispute to one Young, with whom they made an agreement, that he should hold it for her benefit, and, at a future day, convey it to her. Y. paid no part of the consideration money, and never exercised or asserted any acts of ownership over the same, and never expected or intended to set up any claim as against the plaintiff. There was no written evidence of the agreement, and no written declaration of the trust. The parents of the plaintiff took possession

¹ See *Morey v. Herrick*, 18 Penn. St. Rep., 128; *Hoge v. Hoge*, 1 Watts, 213; see ante, 189.

² *Pritchard v. Wallace*, 4 Sneed, 405.

³ 33 Barb. S. C. Rep., 10; *Hosford v. Merwin*, 5 Barb., 51.

of the land and exercised the rights of ownership over it. In March, 1849, a judgment was recovered against Young, and was duly docketed. In May, 1853, Young, in pursuance of the agreement between himself and the parents of the plaintiff, conveyed the land to the plaintiff. All the foregoing facts were stated by him on an examination in proceedings supplementary to an execution issued on the judgment against Young. This examination was in June, 1853. In August following all the interest of Young in the premises conveyed to the plaintiff, was sold under execution, issued on the judgment against Young. A., who was the attorney for the plaintiff in execution, became the purchaser at such sale, and assigned the certificate of purchase to the defendant Austin, who paid no consideration, and to whom the sheriff made his deed of the premises. A. paid the judgment of his client S. against Young, by crediting him the amount on account, and the assignment to the defendant Mary Austin, sister of the purchaser, was upon the consideration of "natural affection." It was held by the court, under the facts of the case, that here was a valid trust, raised by construction of law, and not resting upon the parol agreement of Young; and, consequently, not within the Statute of Frauds. That, as a resulting trust, it was not within the fifty-first section of the Statute of Uses and Trusts,¹ because the operation of that statute is restricted to cases where the party claiming the benefit of the trust

¹ 1 R. S., 728, and cites *Hosford v. Merwin*, 5 Barb., 51.

created it himself; and that it does not extend to trusts created by one person for the benefit of another, without his knowledge, and subsequently accepted by him. The judge, in giving the decision in this case, remarked that the trust was one which fell within that class of trusts described in the books as arising or resulting by implication of law, resting upon the obviously yet insufficiently declared intention of the parties, or upon the fraud and unconscientious dealing which the enforcement of a trust is necessary to prevent; and that it arose in this case "from the payment of the money, the acceptance of the deed by the grantee, and his agreement to fulfill the design of the person who paid the consideration, and to hold the title in trust for a third party. Thus the person who asserts the trust, neither paid the money nor consented to the conveyance to the trustee; and, therefore, an essential element is wanting to bring the case under either section of the statute."¹ In this case, had Young refused to convey the premises to the plaintiff, there can be but little doubt that the court, on application, would have decreed him to be a trustee *ex maleficio*. The trust, in such a case, is not raised so much because of the fraud in the original acquisition of the property, as in the subsequent refusal to execute the trust.²

A trust by implication and construction of law arises in favor of the creditors of one who has paid

¹ 33 Barb. S. C. Rep., 10; *Hosford v. Merwin*, 5 Barb., 51.

² See *Morey v. Herrick*, 18 Penn. St. Rep., 128; *Hoge v. Hoge*, 1 Watts, 213; *Dixson v. Olimus*, 1 Cox Ch. Ca., 414; ante, 189.

the consideration money for the purchase of real estate, but has taken the deed in the name of another. This is the law especially in New York, Michigan, Wisconsin, and some other States, by special statute.¹

Where a grantor, upon executing a grant of land, receives from the grantee, as a consideration for such grant, an agreement not under seal, to support and maintain the grantor, pledging, for that purpose, the produce of the land, and, if necessary, the fee also, the agreement takes effect as an equitable mortgage of the land; and a judgment creditor purchasing under a sale on his execution against the grantee, takes subject to such mortgage.²

Where one partner secretly makes a purchase, for his own use, of a reversion of real estate, occupied by the copartnership under a lease for years, while the other partner, with his concurrence, is negotiating with the owner to obtain the property for the use of the firm, the purchaser will be deemed a trustee for the firm, and will be so declared to be by construction of law.³

Trusts arise, and hence trustees are created by

¹ *McCartney v. Bostwick*, 31 Barb. S. C. Rep., 390; see ante, N. Y. Rev. St., 1859, Vol. III., p. 15, sec. 51, 52, 53; 5 Barb., 51; 12 Barb., 653; 16 Barb., 376; 1 Smith, 475; Mich. Rev. St., 1846, chap. 63, sec. 6; Wis. Rev. St., 1858, chap. 84, sec. 7; see also *Wood v. Robinson*, 22 N. Y. Rep., 564.

² *Chase v. Peck*, 21 N. Y. Rep., 581; see *Miller on Equitable Mortgages*, pp. 1, 2 and 218; *Jackson v. Dunlop*, 1 Johns. Ca., 114; *Jackson v. Parkhurst*, 4 Wend., 369; *Arnold v. Patrick*, 6 Paige, 310; *Day v. Roth*, 18 N. Y. Rep., 448.

³ *Anderson v. Lemon*, 8 N. Y. Rep., 236; see also 1 Paige Ch. Rep., 158, and 17 Ves., 311.

implication and construction of law, in consequence of equitable conversions of property. By an equitable conversion of property is meant an implied or constructive change of property from real to personal, and from personal to real, so that in the transfer or transmission of such property, either by descent or purchase, it comes under those rules which pertain to the new character impressed upon it by such conversion. The doctrine of equitable conversion seems to be a mere consequence of the common doctrine of a court of equity, *that where, things which are lawful and proper to be done, and are agreed to be done, where justice or right requires it, shall be treated as done.*¹

One of the most familiar examples of this kind of conversion is where a contract is made for the sale of land. In such case, in equity and by construction of law, the vendor becomes immediately a trustee for the vendee, of the real estate; and the vendee becomes at the same time a trustee of the vendor, of the purchase money; and consequently there is an implied or constructive change of the *realty* into the *personalty*, and of the *personalty* into the *realty*; so that the vendee is the owner of the land, although the legal title continue in the vendor;

¹ Story's Eq. Juris., sec. 1212, also sec. 791; see also *Craig v. Leslie*, 3 Wheat. Rep., 577; *Beverly v. Peter*, 10 Peters' Rep., 532; *Pulteny v. Darlington*, 1 Bro. Ch. Rep., 237; *Collins v. Champ's Heirs*, 15 B. Monr., 118; *In re Pedder's Settlement*, 31 Eng. L. and Eq. Rep., 244; *Loughborough v. Loughborough*, 14 B. Monr., 549; *Bramhall v. Ferris*, 14 N. Y. Rep., (4 Kern.), 41; *Parkinson's Appeal*, 32 Penn. St. Rep., 455; *Kane v. Galt*, 24 Wend., 641; *Drake v. Pell*, 3 Edw. Ch., 251; see also on this subject, ante, p. 75, *et seq.*

and the money due or to become due, is the personal estate of the vendor; and in equity each will be treated according to this new character thus given.¹

The question of conversion is one of intent; and where the intention to thus convert the property is clearly expressed, or necessarily implied, the court will hold the conversion to be complete; thus, where a testator directs money to be invested in land, or land to be turned into money, such land or money, for all the purposes of the will, becomes that species of property into which it was directed to be converted.² And this intention to convert real estate into personalty, may be implied from the necessity thereof to carry out the purposes of the will, coupled with the power to sell and convey. Thus where a testator, in the next clause of the will to the one appointing his executors, gave to them the power of sale and conveyance, and where it appeared from the whole will that such sale was necessary for carrying out the provisions of the same, it was held, that all the real estate of the testator was to be considered as converted into money, although there was

¹ Story's Eq. Juris., secs. 790, 1212; *Seton v. Slade*, 7 Ves., 264, *et seq.*; *Craig v. Leslie*, 3 Wheat. Rep., 577; *Beverly v. Peters*, 10 Peters' Rep., 532; *Henson v. Ott*, 7 Ind., 512; *Loughborough v. Loughborough*, 14 B. Monr., 549; *Collins v. Champ's Heirs*, 15 B. Monr., 118; *Hare v. Van Deusen*, 32 Barb. S. C. Rep., 92; see *Warren v. Fenn*, 28 Barb. S. C., 333.

² *Lorillard v. Coster*, 5 Paige Ch. Rep., 172; *Kane v. Galt*, 24 Wend., 641; *Drake v. Pell*, 3 Edw. Ch. Rep., 251; *Hawley v. James*, 5 Paige Ch. Rep., 318; *Marsh v. Wheeler*, 2 Edw. Ch. Rep., 156; *Smith v. McCrary*, 3 Ired. Ch., 204; *Byrne v. Stewart*, 3 Desau., 135; *Bramhall v. Ferris*, 14 N. Y. Rep., (4 Kern.,) 41; *Mathis v. Guffin*, 8 Rich. Eq., 79; *Wilkins v. Taylor*, *ib.*, 291; *Harcum v. Hudnall*, 14 Gratt., 369; *Schoonmaker v. Van Wyck*, 31 Barb. S. C. Rep., 457; *Phelps v. Phelps*, 28 Barb. S. C., 121; *Lyman v. Parsons*, 28 Barb. S. C., 564.

no express direction to sell.¹ But a court of equity will not interfere to change the character of property in its administration, unless the intention of the testator, vendor, etc., demands it to be done, to carry out his legal and just intentions. "Thus, a mere authority to the administrator or executor to sell any or all the real estate of the testator, and reinvest the proceeds thereof in personal estate, does not manifest such an intention to convert real estate specifically devised into personalty, as to change the direction of the testator's bounty; but the proceeds of such estate, sold under such authority, are to go to the same persons and in the same proportions as if they had remained real estate."²

In these, as in other cases, the lawful intention of the testator, so far as it can be ascertained, governs. Thus, where the testator directed his trustees and executors to invest the personal property coming to their hands, in such a manner that at the time fixed by the will for a division of the estate among the several devisees thereof, it should consist chiefly or altogether of real estate, the court held that, in deciding upon the validity of such devises, the whole trust fund would be considered and treated as real estate, so far as the devises were legal and could be carried into effect.³

But as the doctrine of equitable conversion arises

¹ *Phelps v. Phelps*, 28 Barb., 121; see also *Parkinson's Appeal*, 32 Penn. St. Rep., 455; *Grievson v. Kirsopp*, 2 Keen, 653.

² *Holland v. Craft*, 3 Gray, 162; *Holland v. Adams*, 3 Gray, 188; see also *Fowler v. Depeau*, 26 Barb., 224.

³ *Hawley v. James*, 5 Paige Ch. Rep., 318; see also *Bunce v. Vandergrift*, 8 Paige Ch. Rep., 37.

out of that rule of a court of equity, which treats as done, that which is lawful and proper to be done, and which also is agreed or intended to be done, it will not be applied to those cases where the thing to be done is unlawful or improper, or where the intention is not clearly expressed, or being expressed, cannot be executed. Thus, where the purpose for which real property is directed by the will to be converted into personalty, fails, the intention of the testator cannot be effected, and therefore there will be no conversion.¹ But where money is given by will, to be invested in real estate, upon failure of the bequest, it will go to the heirs at law.²

It not unfrequently becomes a matter of importance to determine *when* the conversion takes place. This also becomes a question of intention, to be ascertained by considering the language of the will, and the purposes for which such conversion is to take place. Thus, where a testator by his will, directed his real estate to be sold at a certain time, and the proceeds to be divided among nine residuary legatees, one of the legatees, who was a *feme covert*, died before the time of payment: It was held that the land was to be considered as money from the time of the testator's death, and passed to her husband as personal estate; and he having died before the sale, it went to his representative, and not to the next of kin of the wife.³ So also, where

¹ *Hawley v. James*, 7 Paige Ch. Rep., 213; *Hutchinson v. Hammond*, 3 Bro. C. C., 128; see ante, p. 70, *et seq.*

² *Thorn v. Coles*, 3 Edw. Ch., 330; see ante, p. 77.

³ *Rinehart v. Harrison*, Baldw., 177.

land was devised to a daughter, with directions that, on the death of the testator's widow, the land should be sold and the proceeds divided among his children and their heirs, it was held that the land was converted into personalty at the time when the sale was to be made.¹ In general, it is held, that the conversion takes place from the time of the death of the testator, where it is by will, and from the delivery of the deed, where it is by deed.² But where the will directs such sale and conversion to be made on the happening of a particular event, equity will consider the property devised as stamped with its changed character from and after such period.³

Whenever it is found to be the intention of the testator to convert money into land or land into money, that intention prevails, and impresses its character upon the property; and for all such purposes, they being lawful and possible, the money becomes land and the land becomes money by constructive conversion; and whoever becomes the instrument of such conversion, will become a trustee for the purpose specified, by implication and construction of law.⁴

It is a general rule, that where land is directed

¹ *Brothers v. Cartwright*, 2 Jones' Eq., (N. C.,) 113; *Harcum v. Hudnall*, 14 Gratt., 369.

² *Loughborough v. Loughborough*, 14 B. Monr., 549; *Bromhall v. Ferris*, 14 N. Y. Rep., (4 Kern.,) 41; *Parkinson's Appeal*, 32 Penn. St. Rep., 455; *Harcum v. Hudnall*, 14 Gratt., 369.

³ *Brothers v. Cartwright*, 2 Jones' Eq., (N. C.,) 113; *Harcum v. Hudnall*, 14 Gratt., 369.

⁴ See *Commonwealth v. Martin*, 5 Munf., 117; *Phelps v. Phelps*, 28 Barb. S. C., 121; see also *Parish v. Ward*, 28 Barb. S. C., 328.

by will to be converted into money, and the proceeds thereof to be applied to purposes which are illegal and void, a trust will arise by implication and construction of law, in favor of the heir.¹ The land in such cases, is not converted into money by the direction of the testator, because equity will consider that only as done which is agreed to be, and which ought to be done; and that purpose which the law declares to be illegal and void, is deemed to be one which ought not to be accomplished: and whoever takes property subject to such disposition, holds as trustee for those legally entitled.²

So also in cases of lapse, where a legacy is given which lapses by the death of the legatee during the lifetime of the testator, and such legacy is made a charge upon the real estate, a trust may arise in favor of the heir, the next of kin, or the residuary legatee, according as the intention of the testator will seem to be best effectuated.³

In the case of a devise of real estate, charged with the payment of legacies, and there is a lapse by reason of the death of the legatee during the lifetime of the testator, the charge sinks to the benefit of the donee or devisee,⁴ and no trust is raised.

¹ *House v. Chapman*, 4 Ves., 542; *Gibbs v. Rumsey*, 2 V. & B., 294; *Lusk v. Lewis*, 32 Miss., (3 George,) 297.

² *Cook v. Stationers' Co.*, 3 M. & K., 264, *et seq.*; see also *Jarm. Pow. Div.*, 75, *et seq.*

³ *Noel v. Lord Henly*, 1 Dan., 322; *Bowers v. Smith*, 10 Paige, 193; *Akroyd v. Smithson*, 1 Bro. C. C., 503; *Johnson v. Wood*, 2 Beav., 409; *Burr v. Sims*, 1 Whar., 263; *Craig v. Leslie*, 3 Wheat., 583; *Morrow v. Brenizer*, 2 Rawle, 185.

⁴ See *Tucker v. Tucker*, 1 Seld., 104; *Sydenham v. Tregonwell*, 3 Dow., 212.

In New York, the rule of the common law on the subject of lapse has been somewhat modified by statute. It is enacted "that whenever any estate, real or personal, shall be devised or bequeathed to a child or other descendant of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant, who shall survive such testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator, and had died intestate."¹ The statute changes the rule of the common law on this subject, only in cases where the testator is the ancestor of the legatee or devisee; and where the deceased legatee or devisee leaves a child or other descendant *in esse*, at the death of the testator in whom the property devised or bequeathed can vest.²

When a legacy is given to two persons jointly, and

¹ See 2 R. S., 66, sec. 52; also *Bishop v. Bishop*, 4 Hill, 138; *Chrystie v. Phyfe*, 22 Barb., 195; *Armstrong v. Moran*, 1 Bradf., 314; *Willard Ex'rs*, 354.

² *Willard's Ex'rs*, 354. As to the common law rule, that all devises shall be deemed lapsed if the devisee dies in the lifetime of the testator, see *Ballard v. Ballard*, 18 Pick., 41; *Birdsal v. Hewlett*, 1 Paige, 32; *Dunlap v. Dunlap*, 4 Desau., 314; *Gore v. Stevens*, 1 Dana, 205; *Trippe v. Frazier*, 4 Har. & John., 446; *Davis v. Taul*, 6 Dana, 52; *Prescott v. Prescott*, 7 Metc., 145. For special provisions in Massachusetts, see Rev. Stat., chap. 62, sec. 24; also *Ballard v. Ballard*, *ut supra*, and *Fisher v. Hill*, 7 Mass., 86. In Pennsylvania, see Act March 19, 1810, *Purd. Dig.*, 568, also p. 1169, ed. 1847; also 5 *Smith's Laws*, 112; *Woolman's Estate*, 3 Whart. Rep., 477; see also, on the subject of Lapse in Pennsylvania, *Robinson v. Martin*, 2 Yates, 525; *Wieshaupt v. Brehman*, 5 Binn., 118; *Dickinson v. Purvis*, 8 S. & R., 71; *Craighead v. Given*, 10 S. & R., 351.

one of them dies before the testator, the share of the decedent will not lapse but will survive to the other legatee.¹ There is a distinction to be made where legacies are given to several individuals by name, and where they are given to them as a class. Thus, where legacies are given to several legatees by name, and one of them dies during the lifetime of the testator, his share will lapse.² But where the legacy is to several individuals as a class, as to the children of A., and one of the class dies before the testator, there will be no lapse, but it will go to augment the shares of the others.³ But where real and personal property is directed to be divided equally among three individuals, and one of them dies in the lifetime of the testator, such share sinks into the residue, because it was not given "*per mie et per tout*," as in case of joint tenancy.⁴

In the foregoing class of cases, trustees will be constituted by implication and construction of law; but whether they are to sustain that relation to the heir, next of kin, devisee, legatee or others will be

¹ Gardner v. Printup, 2 Barb. S. C. Rep., 83; Willard's Ex'rs, 354.

² Bagwell v. Dry, 1 Pr. Wms., 700. For general rule, see Roper on Legacies, p. 484; see also 4 Kent's Com., 54, (marginal,) and his notes; also Man v. Man, 2 Stra., 905; Page v. Page, 2 P. Wms., 488; Owen v. Owen, 1 Atk., 494; Bain v. Lescher, 11 Sim., 397; Norman v. Frazier, 3 Hare, 84; Havergall v. Harrison, 7 Beav., 49; Hustler v. Tilbrook, 9 Sim., 368.

³ 2 Bro. C. C., 658; Gardner v. Printup, 2 Barb. S. C. Rep., 83; Davis v. Kemp, Carth., 3; Buffar v. Bradford, 2 Atk., 220; Humphrey v. Taylor, Ambl., 136; Dowsett v. Sweet, Ambl., 175; Morley v. Bird, 3 Ves., 628; Pemberton v. Park, 5 Binn., 607; but see Swift v. Duffield, 5 S. & R., 38.

⁴ Corn v. Nase, 1 Ashm. Rep., 242; Frazier v. Frazier, 2 Leigh Rep. 642; Nelson v. Moore, 1 Ired. Eq. Rep., 31.

more properly considered under the title of *cestuis que trust*, etc.

Where legacies have been paid under a misapprehension as to the sufficiency of assets to pay the debts of the testator, the legatees may be required to contribute to make up the deficiency, provided it does not exceed the amount of their legacies: and, if necessary, they may be converted into trustees for such purpose.¹ But in making these contributions, the general legacies must first be exhausted, before the specific ones will be called upon to contribute.² A specific legacy is defined to be "the bequest of a particular thing or money specified and distinguished from all others of the same kind; as a horse, a piece of plate, money in a purse, stock in the public funds, a security for money, which, with the assent of the executor, would immediately vest in the legatee."³ And a specific legacy may call for a specific thing, which alone can satisfy it: as, "the brooch which I received from A. B.," or, "my horse Castor;"⁴ or may call for one of a certain species, as "a brooch," "a horse," "a diamond

¹ *Lupton v. Lupton*, 2 Johns. Ch., 614; *Stuart v. Kissum*, 2 Barb., 493; *Wood v. Vandenburg*, 6 Paige, 277; *Alexander v. Farr*, 2 Jones' Eq., 106.

² *Roper on Legacies*, 361; *Spong v. Spong*, 1 Dow. & Cl., 365; *Willard's Ex'rs*, 382; *Lupton v. Lupton*, 2 Johns. Ch., 614; *McKay v. Green*, 3 Johns. Ch., 56; *Livingston v. Livingston*, 3 Johns. Ch., 148.

³ *Ashton v. Ashton*, Ca. Temp. Talbot, 152; *Roper on Legacies*, Vol. I., 190; and see *Tift v. Porter*, 4 Seld., 518; *Davis v. Cain*, 1 Ired. Eq. Rep., 309; *Robinson v. Addison*, 2 Beav. 515; *Partridge v. Partridge*, Ca. Temp. Talbot, 226; *Simmons v. Vallance*, 4 Bro. C. C., 345; *Sibley v. Perry*, 7 Ves., 524.

⁴ *Richards v. Richards*, 9 Price, 219; *Roper on Leg.*, 192; *Willard's Ex'rs*, 348.

ring," which may be satisfied by the delivery of one of the species.¹ Also a sum of money to be paid out of a particular fund, called a *demonstrative legacy*, is specific as to the legatee; although it will not abate on the failure of the fund.²

The consequences of specific legacies are liable to be such, both in respect to the legatees and others interested, that the intention of the testator to make them specific, must be clear and unquestionable. The presumption, both in law and equity, is in favor of general legacies, as against specific ones.³

A person holding under a voluntary conveyance is sometimes constituted a trustee for the grantor, even where there is no declaration of trust in the instrument. Although, where a voluntary conveyance is fairly made, and there are no circumstances to show that it was not intended to be absolute, the court will sustain it,⁴ yet equity does not favor the volunteer. And, if his claim depends upon an agreement which is executory, the court will not

¹ 2 Mad. Ch. Pr., pp. 7 and 8; Toller, 301; Willard's Ex'rs, 348; Roper on Leg., 192.

² Willard's Ex'rs, 348; Coleman v. Coleman, 2 Ves. Jr., 160; Roper on Leg., 193.

³ Walton v. Walton, 7 Johns. Ch. Rep., 264; Tift v. Porter, 4 Seld., 518; Enders v. Enders, 2 Barb. S. C. Rep., 367; Smith v. Lampton, 8 Dana Rep., 69; Bradford v. Haynes, 20 Maine Rep., 107; Cogdell v. Cogdell, 3 Desauss., 373; Briggs v. Hosford, 22 Pick., 288; Stout v. Hart, 2 Halsted Rep., 422; Walker's Estate, 3 Rawle, 236; (see also Coleman v. Coleman, 2 Ves. Jr., 639, and Sumners's notes thereto;) Tift v. Porter, 8 N. Y. Rep., 516.

⁴ Sowerby v. Arden, 1 Johns. Ch. Rep., 240; Clavering v. Clavering, 2 Vern., 473; Cook v. Fountain, 3 Sw., 590; Young v. Peachy, 2 Atk., 256; Dummer v. Pitcher, 2 M. & K., 262; Bunn v. Winthrop, 1 Johns. Ch., 329; Wood v. Jackson, 8 Wend., 9; Whelan v. Whelan, 3 Cowen, 537; Sears v. Shafer, 1 Barb., 408; see Philbrook v. Delano, 29 Maine, 410.

aid him,¹ and where one volunteer seeks relief against another volunteer, equity will not interfere, because, as between mere volunteers, there is no equity.²

There has been considerable discussion whether a good and meritorious consideration will be sufficient to sustain a covenant to convey property, but the current of decisions in England is against the validity of such a covenant,³ while in America it would seem to be the other way.⁴

Where the grantor of a voluntary deed retains the possession of it until his death, coupled with circumstances which tend to show that he did not intend to part with it, or that the deed was

¹ *Cook v. Fountain*, 3 Sw., 591; *Cecil v. Butcher*, 2 J. & W., 565; *Edwards v. Jones*, 1 M. & Cr., 226; *Dillon v. Coppin*, 4 M. & Cr., 647; *Hayes v. Kershaw*, 1 Sandf. Ch. Rep., 258; *Dennison v. Goehring*, 7 Barr., 175; *Ellison v. Ellison*, 6 Ves., 656; *Antrobus v. Smith*, 12 Ves., 39; *Scales v. Maude*, 19 Jur., 1147; *Crompton v. Vasser*, 19 Alab. 259; *Clark v. Lott*, 11 Ill., 105; *Darlington v. McCooile*, 1 Leigh, 36; *Holloway v. Headington*, 8 Sim., 324; *Jefferys v. Jefferys*, 1 Cr. Ph., 138; *Boze v. Davis*, 14 Texas. 331; *Moore v. Crofton*, 3 Jones & Lat., 442; *Acker v. Phoenix*, 4 Paige, 308; *Minturn v. Seymour*, 4 Johns. Ch. Rep., 497; *Yarborough v. West*, 10 Geo., 471; *Read v. Robinson*, 6 W. & S., 331; *Forward v. Armstead*, 12 Alab., 127; *Duvoll v. Wilson*, 9 Barb., 487.

² See *Cook v. Fountain*, *ut supra*; *Clavering v. Clavering*, 2 Vern., 473; see ante, 36; *Brackenbury v. Brackenbury*, 2 J. & W., 391.

³ *Scales v. Maud*, 19 Jur., 1147; *Edwards v. Jones*, 1 M. & Cr., 226; *Dillon v. Coppin*, 4 M. & Cr., 647; *Holloway v. Headington*, 8 Sim., 324; *Jefferys v. Jefferys*, 1 Cr. & Ph., 138; *Moore v. Crofton*, 3 Jones & Lat., 442; *Smith v. Warde*, 15 Sim., 56.

⁴ *Hayes v. Kershaw*, 1 Sandf. Ch., 261; *Taylor v. James*, 4 Desau., 5; *Caldwell v. Williams*, 1 Bail. Ch., 175; *Dennison v. Goehring*, 7 Barr., 175; *McIntyre v. Hughes*, 4 Bibb., 186; but see *Duvoll v. Wilson*, 9 Barb., 487; *Buford's Heirs v. McKee*, 1 Dana, 107; *Kennedy's Ex'rs v. Ware*, 1 Barr., 415; *Campbell's Estate*, 7 Barr., 100; see *Fink v. Cox*, 18 Johns., 145; *Blue v. Peneston*, 24 Miss., (3 Jones,) 240; see *Farrington v. Barr*, 36 N. H., 86.

made for other purposes than conveying the beneficial interest to the grantee, a trust will result to the grantor,¹ although it is held that the mere retaining the possession of the deed by the grantor will not be sufficient evidence to raise a trust in his favor.²

Whether a trust is to be raised in favor of the grantor in any given case, must depend upon the intention as gathered from all the circumstances.

But a trust may be raised in favor of the grantor where the property is given in trust to a trustee, either by deed or will, and yet a trust is not declared as to all the property.³ In such case the donee cannot take beneficially, because the gift is expressly in trust;⁴ and whatever remains after the purposes of the express trusts are satisfied, must revert to the donor, where it is by deed; or, to the heir or next of kin, where it is by will.⁵

Whether a trust results to the grantor, the heir-at-law, the next of kin, or not, depends upon the intention as gathered from the instrument and attending circumstances; for it is the intent which guides the use. An examination of all the cases will show this distinction. Where the property is given in trust for the accomplishment of certain

¹ *Birch v. Belgrave*, Ambl., 266; see *Baylis v. Newton*, 2 Vern., 28; *Souverbye v. Arden*, 1 Johns. Ch. R., 240; *Uniacke v. Giles*, 2 Moll., 267; see ante, p. 36; *Holloway v. Headington*, 8 Sim., 324.

² *Bunn v. Winthrop*, 1 Johns. Ch. Rep., 329; *Sear v. Ashwell*, 3 Sw., 411; *Souverbye v. Arden*, 1 Johns. Ch. Rep., 240.

³ 2 Jarm. Pow. Dev., 32.

⁴ *Gladding v. Yapp*, 5 Mad., 59.

⁵ *Mapp v. Elcock*, 2 Phill., 793; *Dawson v. Clark*, 18 Ves., 254; *Cradock v. Owen*, 2 Sm. & Giff., 247.

purposes, when those purposes are accomplished, the balance will revert to the donor, the heir, or next of kin, according to circumstances.¹ But where the property is given, subject to, or charged with the accomplishment of such purposes, the donee takes the beneficial interest, subject to such charges, and the balance will not revert.² This distinction is most obvious, as expressing the intention of the donor or testator, and should not be confounded with the old English doctrine, that the mere appointment of an executor gave to him, *prima facie*, the beneficial title to the residuum of the personal estate. That doctrine is now repudiated in England, or rather has been changed by statute.³ Sometimes the language may be such as to leave it in doubt whether the testator intended to give the property, in trust for certain purposes, or whether he intended to give it *subject only* to charges for such purposes. In such cases, other circumstances may be examined to aid in determining such inten-

¹ King v. Denison, 1 V. & B., 272; Hobart v. Countess of Suffolk, 2 Vern., 644; King v. Mitchel, 8 Pet. Rep., 349; Nash v. Smith, 17 Ves., 29; Chalmers v. Brailsford, 18 Ves., 368; Sherrard v. Lord Harborough, Amb., 165; Attorney General v. Bowyer, 3 Ves., 725; Craddock v. Owen, 2 Sm. & Giff., 246; Countess of B. v. Hungerford, 2 Vern., 645; Holliday v. Hudson, 3 Ves., 210; Elcock v. Mapp, 3 H. & L. Cas., 492; Hill v. Cock, 1 V. & B., 173; Williams v. Chitty, 3 Ves., 546.

² King v. Denison, 1 V. & B., 260, 272; Walton v. Walton, 14 Ves., 322; Dawson v. Clarke, 15 Ves., 247, and 18 Ves., 247; Hill v. Bishop of London, 1 Atk., 618; Mullen v. Bowman, 1 Coll. N. C. C., 197; Wood v. Cox, 2 Myl. & Cr., 692; Rodgers v. Rodgers, 3 P. Wms., 193; Fink v. Cox, 18 Johns., 145.

³ 1 Will. IV., chap. 40; see also Taylor v. Haygarth, 14 Sim., 8; Powell v. Merrett, 1 Sm. & Giff., 381, (22 L. J. Ch., 408;) Craddock v. Owen, 2 Sm. & Giff., 246.

tion, or particular expressions may be considered, as where the relation between the testator and donee is such, and the expressions are such, as to show he intended a benefit. Thus, where the testator made and constituted his *dearly beloved wife, his sole heiress and executrix*;¹ or, where the devise was “*for his own use and benefit forever* ;”² “*or, free and unfettered*,” etc., such expressions have aided the court in determining in favor of the donee.

Expressions of affection and love for the donee, or even of relationship, have been called in aid to ascertain the testator's intention ;³ and the intention of the testator to give to the donee beneficially, has been inferred from the infancy of the donee, or the unfitness of the appointment, if the donee was merely a trustee.⁴

The law generally in the several States is adverse to the claim of the executor to any undisposed of residue of the personal estate of the testator. Perhaps in no State will it be given to him in his character merely as executor, while it may be in his character as residuary legatee.⁵ In several of the States the executor is excluded by the express pro-

¹ *Rodgers v. Rodgers*, 3 P. Wms., 193.

² *Wood v. Cox*, 2 M. & Cr., 684.

³ *Rodgers v. Rodgers*, 3 P. Wms., 193; *King v. Denison*, 1 V. & B., 274; *Cunningham v. Mellish*, Prec. Ch., 31; *Hobart v. Countess of Suffolk*, 2 Vern., 644.

⁴ *Blenkhorn v. Feast*, 2 Ves. Sr., 27; *Williams v. Jones*, 10 Ves., 77, 83; *Cook v. Hutchinson*, 1 Keen, 42.

⁵ *Hill v. Hill*, 2 Hayw. Rep., 298; *Paup v. Mingo*, 4 Leigh, 163; *Hayes v. Jackson*, 6 Mass., 153; *Wilson v. Wilson*, 3 Bin., 559; *Darrah v. McNair*, 1 Ashm., 240; see *Story's Eq. Jur.*, sec. 452; 2 Lomax Ex'r, 184. See, in England, as to residuary legatees, *Gibbs v. Ramsey*, 2 V. & B., 294; see also *Craddock v. Owen*, 2 Sm. & Giff., 241.

visions of their statutes of distribution.¹ But whether the executor shall or shall not take the residuum, after all the purposes of the express trusts of the will are satisfied, is a question of intention on the part of the testator as gathered from all parts of the will. This question has been largely discussed in England, and divers rules of interpretation have been laid down, as guides to the ascertainment of the true intent of the testator. Thus, where the testator has given an express legacy to the executor, and there was still a residue undisposed of in his hands, the fact that the executor was the donee of a part, has been considered evidence that he could not have been intended to be a donee of the whole; and, hence, in such cases, he has been decreed to be a trustee for the next of kin.² But this rule is not altogether satisfactory, as unerringly evincing the intention of the testator; as, indeed, no rule declaring what shall be the effect of any given fact or circumstance in every case can be. The same fact may be conclusive under one set of circumstances, and have little weight under others. Therefor, to seize upon such fact, in any case or number of cases, and say that it shall have such an interpretation in all cases, is establishing a rule not based upon a principle, and to which numerous exceptions, begetting confusion, must necessarily arise. Thus, this rule that the

¹ See Dunlop, (Penn.,) 241; Del. Rev. Code, 1852, Art., 1843; N. Y. Rev. St., 1846, Vol. II., p. 159, sec. 79.

² Langham v. Sanford, 17 Ves., 435; Abbott v. Abbott, 6 Ves., 343; Farrington v. Knightly, 1 P. Wms., 545.

testator, by giving to the executor a part, evinced an intention not to give him the whole, has been the subject of numerous exceptions. It is not difficult to conceive of numerous reasons why a testator might wish to give to his executor a particular legacy for certain particular reasons, and also make him his residuary or general legatee; and he might wish to give to him both, as executor in one instance, and as an individual in another.¹

Where there are devises and bequests, which include the whole of the testator's real and personal estate, and trusts are declared, as to a part only, or as to the whole, and there is a failure, either from lapse or from the illegality of the purposes of the trust, or from the insufficiency of the declaration thereof, or for any other cause, difficult questions often arise between the heir, the next of kin, and the residuary legatee or devisee, as to whom this benefit shall result. The discussion of these questions more properly belongs to a subsequent chapter on *cestuis que trust*. In this place those considerations only are to be considered, which

¹ *Gibbs v. Rumsey*, 2 V. & B., 294; see Lord Eldon in *King v. Denison*, 1 V. & B., 277. To see the discussion on this subject, see *Langham v. Sanford*, 17 Ves., 435; *Seely v. Wood*, 10 Ves., 71; *Blinkhorn v. Feast*, 2 Ves. Sr., 27; *Nisbett v. Murry*, 5 Ves., 149, *et seq.*; *Lynn v. Beaver*, T. & R., 63; *Martin v. Rebow*, 1 Bro. C. C., 154; *Oldman v. Slater*, 3 Sim., 84; *Southcott v. Watson*, 3 Atk., 226; *Benning v. Benning's Ex'r*, 14 B. Monr., 585; *Griffith v. Rogers*, Prec. Ch., 231; *Rawlins v. Jenkins*, 13 Ves., 39; *Hennersholtz's Estate*, 4 Harr., (Pa.), 435; *Ralston v. Telfair*, 2 Dev. Eq., 255. As to the application of this rule to a devisee who also is a legatee, see 2 Jarm. Pow. on Dev., 40. As to the heir as legatee, see *Starkey v. Brooks*, 1 P. Wms., 390; *Randall v. Bookey*, 2 Vern., 425; *Kellett v. Kellett*, 1 Ball & B., 543; S. C. on App'l, 3 Dow. P. C., 248; but see *Rogers v. Rogers*, 3 P. Wms., 194.

convert the donee into a trustee by implication or construction of law.

Another class of resulting trusts arise, by which the donee is converted into a trustee for other beneficiaries than those named by the testator, by reason of the insufficiency of the testator's declaration. In these cases the donee is expressly declared to take in trust, but the trusts are so imperfectly or ineffectually declared that they cannot be executed. Thus, a leading case of this class is that of *Morice v. the Bishop of Durham*,¹ where the testatrix bequeathed all her personal estate to the Bishop of Durham, his executors, etc., upon certain trusts, and the ultimate residue to be appropriated by the Bishop to "such objects of benevolence and liberality as he, in his discretion, should most approve." In this case the objects of the trust were too indefinite for the court to undertake its execution, and the Bishop was decreed to hold the residue in trust for the next of kin.¹

Where the testator has declared expressly that he has given the estate *in trust*, to the executors, to be appropriated by them, in such manner, at such time, and for such purposes, as they, in their discretion, should think fit, the courts have gone to very great lengths in frustrating the *will and intent* of the testator, for no other reason than that he had used the words "in trust" in connection with the

¹ 9 Ves., 399, and 10 Ves., 522; see also *Ellis v. Selby*, 7 Sim., 352, and S. C. on App'l, 1 M. & Cr., 286; *Stubbs v. Sargon*, 2 Keen, 255, and on App'l, 3 M. & Cr., 507; *Fowler v. Garlike*, 1 R. & M., 293; *James v. Allen*, 3 Mer., 17; *Vezey v. Janson*, 1 S. & St., 69.

gift; at least, the English authorities have done so.¹ But in the case of *Ralston v. Telfair*² it was held that where a testator had given the residue of his estate, after certain trusts were satisfied, to his executors, "to be disposed of as they think proper," the *beneficial* interest was given to them.

In the case of *James v. Allen*,³ the testatrix bequeathed all her personal estate to her executors, *in trust*, to be by them applied and disposed of for and to such benevolent purposes as they, in their integrity, may unanimously agree on." In the case of *Ellis v. Selby*,⁴ the testator gave a fund to his executors upon certain trusts; and if those trusts should fail, his said trustees should apply the fund to and for such charitable or other purposes as they should think fit, "*without being accountable to any person whomsoever* for such disposition thereof." So likewise, in the case of *Vezey v. Janson*,⁵ the testator gave the residue of his estate to his executor, upon trust, in default of appointment by him, "to pay and apply the same in or toward such charitable or public purposes, as the laws of the land would admit of, or to any person or persons, and in such shares, etc., as the executor, in his discretion, will, and pleasure, should think fit." So, also, in the case of *Fowler v. Garlike*,⁶ the testator made a gift to his executors, *upon trust*, "to dispose

¹ See preceding note.

² 2 Dev. Eq., 255.

³ 8 Mer., 17.

⁴ 7 Sim., 352, and 1 M. & Cr., 286.

⁵ 1 S. & S., 69.

⁶ 1 R. & M., 232.

of the same, at such times, and in such manner, and for such uses and purposes as they shall think fit; it being my will that the distribution shall be left entirely to their discretion." In these and the like cases, the courts have held that these dispositions to the executors were upon trust, notwithstanding the palpable meaning and intent of the testator to commit the disposition of the property absolutely to their will and discretion, without being subject to the control of any person or persons whatever.

CHAPTER III.

ACCEPTANCE AND DISCLAIMER OF TRUSTEES.

Before the character and liabilities of a trustee of an express trust can attach to an individual, he must accept the office. For no person can be compelled to accept an estate in property of any character, or to act in any official or fiduciary position without his consent. Therefore, where an estate is conveyed, by whatever means of assurance, to a person in trust, no title vests in the proposed trustee, unless he expressly or by implication, accepts the office and thereby assumes the liabilities thereof.¹

The acceptance of the office of trustee may be proved by the declarations or other acts of the trustee. When the trust is created by deed, and the trustee intends to accept the appointment and execute the trust, the proper way to manifest that intention is to join in the execution of the deed. This will in general be necessary when the instru-

¹ *Burritt v. Silliman*, 3 Kern., 93; *Cooper v. McClure*, 16 Ill., 435; see *De Peyster v. Clendining*, 8 Paige, 295; *Bulkley v. De Peyster*, 26 Wend., 21; *King v. Donnelly*, 5 Paige, 46; *McCubbin v. Cromwell*, 2 Gill. & Johns., 157; *Trask v. Donoghue*, 1 Atk., 370; but see *Judson v. Gibbons*, 5 Wend., 224.

ment contains covenants to be made and executed by the trustee. But when the instrument contains nothing of the kind, joining in the deed is unnecessary,¹ any act by which the trustee manifests an intent to acquire or exercise any influence in the management of the trust property, will tend to fix upon him the responsibilities of the trust.²

If the trust is created by will, and the same person is appointed executor and trustee, the probate of the will will be deemed an acceptance of the trust. Such, at least, will be the case, unless the office and duties of executor and trustee are so distinct from each other that the office of the one can be accepted, and the other declined, at the same time.³ In some states the trustee is required to give bonds, and if he fails to do so he is deemed to have declined the trust.⁴ Under such circumstances a different rule would obtain. Where a person is appointed trustee, and he does not intend to accept the trust, great care must be had that no action on his part in respect to the trust property may fix him with the trust. Any act which would render it doubtful whether or not he intended to act as

¹ *Flint v. Clinton Co.*, 12 N. H., 432; *Leffler v. Armstrong*, 4 Iowa Rep., 482.

² *Christian v. Yauncey*, 2 P. & H., (Va.), 240; *O'Neil v. Henderson*, 15 Ark., 235.

³ *Hanson v. Worthington*, 12 Md., 418; *Williams v. Conrad*, 30 Barb. S. C., 524; *Booth v. Booth*, 1 Beav., 128; *Williams v. Nixon*, 2 Beav., 472; *Worth v. M'Aden*, 1 Dev. & Batt. Eq., 209; *Judson v. Gibbons*, 5 Wend., 226.

⁴ Mass. Rev. Stat., 1836, p. 444; *Green v. Borland*, 4 Metc., 330.

trustee would be liable to be construed against him.¹ The principles to be observed are: 1, the law will compel no person to accept an estate, either as trustee or otherwise, against his will; 2, every gift by deed or otherwise, is supposed to be beneficial to the donee, and therefore the law presumes the estate is accepted by the person to whom it is expressed to be given, unless the contrary is made to appear;² 3, a refusal or disclaimer vests the estate or trust in the accepting or continuing trustee or trustees. Therefore, before one, who has been named as trustee, consents to do anything in respect to the trust, he should first, unless he intends to accept the same, make his refusal to accept so clear and definite, that by no possibility the trust can vest in him.³ Where a trustee has so disclaimed that the trust has vested entirely in those who accept it, after that, no act of his can divest the accepting trustees of the title. Thus, in the case of *Dove v. Everard*.⁴ Everard and Manby were appointed trustees and executors by the testator. Everard being a creditor, concluded not to act, and executed a deed of disclaimer as to

¹ *Read v. Truelove*, Ambl., 417; *Lewin on Trusts*, 232; *Chaplin v. Givens* 1 Rice Eq., 154; *Conyngham v. Conyngham*, 1 Ves., 522.

² *Hill on Trustees*, 214; *Thompson v. Leech*, 2 Ventr., 198; *Townson v. Tickells*, 3 B. & Al., 36; 4 Cruise Dig., 404, &c.; *Wilt v. Franklin*, 1 Binn., 502.

³ *Read v. Robinson*, 6 Wats. & Serg., 331; *Eyrick v. Hetrick*, 13 Penn. St., 494.

⁴ 1 Russ. & Myl., 231; *in re Van Schoonhoven*, 5 Paige, 559. That such disclaimer vests the estate in those who accept, see *Smith v. Wheeler*, 1 Ventr., 128; *Hawkins v. Kemp*, 3 East, 410; *Thompson v. Tickell*, 3 B. & Ald., 31; *King v. Donnally*, 5 Paige, 46; *Putnam Free School v. Fisher*, 30 Maine, 520; *Jones v. Moffet*, 5 S. & R., 523; *Brumer v. Sterm*, 1 Sandf. Ch., 357.

the real estate, and renounced probate in the Ecclesiastical Court. Manby alone proved the will; but he was altogether unacquainted with the managing of farming stock or with its value. Everard, after thus disclaiming and renouncing, as the agent of Manby, took an active part in converting the assets into money, and accounted with Manby for all moneys which had come to his hands. For thus acting in the management of the trust property, he was made a party defendant to a suit for the administration of the assets. The M. R., Sir John Leach, was of the opinion that Everard had not acted as trustee or executor, and dismissed the bill as against him, with costs.¹ The case cited by the counsel² in the case of *Dove v. Everard* differed in this. True, Dove did not renounce until after he had fixed himself with the trust, by administering in part. Thus also in *re Hadley's trust*,³ Mrs. Hadley by her will, dated 26th Dec., 1831, bequeathed certain leasehold estates and personal property to F. Blakesly and T. C. Brown, on certain trusts therein mentioned: and in said will gave the following power for the appointment of new trustees. "If the trustees hereby appointed, or to be appointed as hereinafter is mentioned, or any of them, their, or any of their heirs, executors, administrators or assigns shall die, or desire to be discharged from, or refuse, or decline, or become incapable to act in, the trusts, powers

¹ See preceding note.

² *Reed v. Truelove*, Ambl., 417.

³ *In re Hadley's trust*, 9 Eng. Law and Eq. Rep., 67; 16 Jur., 98; 21 Law J. Rep., (N. S.,) Chan. C., 109.

and authorities hereby in and to them respectively reposed and given as aforesaid, before the said trusts, powers and authorities shall be fully executed, then and so often as the same shall happen, it shall and may be lawful to and for the then surviving or continuing trustee or trustees of my said will, or if there shall be no surviving or continuing trustee, then the trustee so desiring to be discharged, or refusing or declining, or becoming incapable to act as aforesaid, or the executors or administrators of the last surviving or continuing trustee, by any deed, &c., from time to time, to nominate, substitute or appoint any other person or persons to be a trustee or trustees in the stead or place of the trustee or trustees so dying, or desiring to be discharged, or refusing, declining, or becoming incapable to act as aforesaid." T. C. Brown died in the lifetime of the testatrix. Mrs. Hadley died in November, 1849. Blakesly, by deed dated 17th December, 1849, renounced and disclaimed the trusts of the will, with the exception following. "Save and except the power given by the said will to the said F. Blakesly (he being the sole person now living named in said will as trustee, and declining to act), for the purpose of nominating other persons to be trustees in the stead of the said T. C. Brown, deceased, and the said F. Blakesly. And by the same indenture, Blakesly appointed W. H. Brown and J. Whitmore to be trustees in stead, &c., and he assigned the trust property to them. Blakesly had renounced probate of the will, and had never acted otherways than in the appointment of the trustees and the assignment

aforesaid. There being doubts as to the regularity of this proceeding in the appointment of the new trustees, a petition was presented to the court asking their appointment by the court. Parker, V. C. considered the appointment to be regular and valid. That the words in the power, "trustees hereby appointed," were descriptive of the persons, &c., who were authorized to exercise the power of appointment, the same as though she had named them by their names. That on the question whether one who renounced the trust, &c., could properly make the appointment, the testatrix herself had distinctly authorized it, &c. As to the vacancy happening by the death of a trustee during the lifetime of the testatrix, he thought that was as much a contingency provided for as though it had taken place *after* the death of the testatrix.¹ But it is important that no act connected with the disclaimer shall fix the trust upon the renouncing trustee. In the case of *Crewe v. Dicken*,² Wheeler, Crewe and Boydell, and the survivor of them, &c., were appointed trustees to sell certain estate, &c. Boydell died, and Wheeler being unwilling to act in the trust after the death of Boydell, by indentures of lease and release, conveyed and released all and singular the said premises, and all his said estate and interest therein to Crewe, the other trustee. Crewe contracted the estate to Dicken, but Dicken refused to take the conveyance

¹ See ante, and authorities.

² 4 Ves., 96; see *Smith v. Wheeler*, 2 Vent., 128, and 2 Kebl, 772; *Adams v. Taunton*, 5 Mudd., 435; *Nicholson v. Wordsworth*, 2 Swanst., 365; *Bonifant v. Greenfield*, Cro. Eliz., 80.

unless Wheeler would join in the receipt of the purchase money, which he declined doing. Crewe filed his bill against Dicken for a specific performance. The Lord Chancellor (Loughborough), under the circumstances, refused the prayer of the bill. He thought there would have been no difficulty in the case if Wheeler had first renounced or disclaimed. Then the whole estate would have been in the plaintiff Crewe, exactly as though the other two trustees had died in the lifetime of the testator.¹ But according to the way he had managed it, he had accepted the trust, and conveyed away the estate: and that part of the trust which consisted in the application of the money he could not convey away, and that although the hazard was not probably great, he could not compel the purchaser to incur it; taking the title with a knowledge of the trust, he would be bound to see to the application of the money. In the case of *Urch v. Walker*,² John Frankling, by his will, gave and bequeathed unto Robert Blackburn and Edward Wood, the sum of £1100 upon trust, to invest the same, and pay the interest thereof to his daughter Mary, then the wife of John Urch, for her separate use for life; and after her decease, or in case she should incur the same, to apply the interest in the maintenance of such of her children as should be then living (excepting her children by a former marriage) until the youngest should attain the age of twenty-one,

¹ *Leggett v. Hunter*, 19 N. Y. Rep., (5 Smith,) 445.

² 3 Mylne & Craige, 702.

when he directed the capital to be equally divided among them. And among other devises and bequests, in particular, he devised the dwelling house in which he then lived, with the garden, orchard and close of ground thereunto belonging, situate at Banwell, and held under the Bishop of Bath and Wells upon a lease for three lives, unto the same trustees Blackburrow and Wood, to hold the same upon trust, to permit and suffer his wife, Ann Frankling, and her assigns, to receive the rents and profits of the premises during her life, and after her decease, to apply the same in the maintenance and education of his grandson, John Frankling Hewlett until he should attain the age of twenty-one years, when he directed his said trustees or the survivor, &c., to convey the premises to his said grandson, John Frankling Hewlett, his heirs and assigns, and also to pay over to him the unapplied rents and profits accrued during his minority. The testator gave the residue of his estate and effects to his wife Ann Frankling, whom he appointed his sole executrix.

The bill was filed by the parties interested in the legacy of £1,100, and they sought to make Blackburrow, surviving trustee appointed by the will, personally responsible for the legacy, on the ground that he had accepted and acted in the trusts of the testator under the will. But there was no proof that either Blackburrow or Wood had ever acted in, or meddled with the trusts of the will, except as follows: On the 18th day of May, 1822, the said trustees, Blackburrow and Wood, at the request of

John Frankling Hewlett, who had arrived at the age of twenty-one years, and, according to the terms of the will, was entitled to a conveyance of the dwelling house, &c., had, by an indenture of release, of that date, conveyed the premises to said Hewlett. It was recited among other things in this indenture, that this conveyance was made by the trustees, to Hewlett, because by virtue of the said will, the legal estate in said messuage and lands was outstanding in the trustees, and therefore they had consented to make such conveyance. Blackburrow proved by his solicitor, that before executing the deed of release, he had taken counsel upon the question whether it would be safe for him and Wood to execute such release; and that counsel advised him that it would be safe.

The vice-chancellor held that Blackburrow had accepted the trusts of the will. The case was appealed and came before the Lord Chancellor in June, 1838. The Lord Chancellor remarked: "The question is, whether the execution of this deed was not of itself an acceptance of the trusts of the will," "I think it would be sanctioning a gross deceit on the part of the appellant (Blackburrow) if it were to be construed otherwise, because it was for the purpose of giving effect to the devise of the property. If the trustees never did accept the property, then they had no legal estate in them, and they had no means of doing that which they professed to do, and which by this deed, they held out they were doing."

The Lord Chancellor distinguished this case from

that of *Nicolson v. Wordsworth*¹ where one of the three trustees, being desirous of throwing off the obligations of the trust, and disclaiming, executed a release to the other trustees. He says, the reasoning of Lord Eldon in the case of *Nicolson v. Wordsworth* "has no application to the case of a person who is not repudiating, but acting upon the interests which the will purports to give." That in the case before the court, Blackburrow and Wood, the trustees named in the will, upon the face of the instrument, do not profess to repudiate the trust, but recite the property vested in them by the will, and, that in execution and pursuance of the trust, they executed the deed in question. It is said there is a recital in the deed that he had not intermeddled. But, remarks the Chancellor, there is no recital that he never intended to intermeddle, or that he executed the deed because he disclaimed the trust; on the contrary the reason assigned is that the party having attained twenty-one, "it became necessary for the defendant and Wood to act in the trust declared by the said will, and in fact they never intermeddled therein." So far, therefore, from this instrument showing any intention on his part to repudiate the trust, the appellant there expressly says that he executes it in pursuance of and acting upon the trusts, and is dealing with the property as the testator intended he should deal with it."²

The case of *Nicolson v. Wordsworth*³ to which

¹ 2 Swanston, 365; see *Doe d. Wyatt v. Hogg*, 5 Bing. N. C., 564.

² *Gibson v. Walker*, 20 N. Y. Rep., 476.

³ 2 Swanston, 365.

the Lord Chancellor refers, was this: Richard Wordsworth, by will dated 6th May, 1816, devised certain premises to Christopher Wordsworth, William Wordsworth and Thomas Hutton, and their heirs, in trust, to sell, and apply the money produced by such sale in aid of the personal estate towards payment of his debts, funeral expenses, and certain legacies, with a declaration that the receipts in writing of his trustee or trustees, for the time being, should be a good discharge to the purchaser of the premises, and that it should be lawful for the trustee or trustees, for the time being, by any writing or writings, to appoint a new trustee or trustees in lieu of any trustee or trustees who should die, or desire to be discharged, or refuse or decline, or become incapable to act, and the testator appointed his wife, Jane Wordsworth, his executrix. Jane Wordsworth, Christopher Wordsworth and William Wordsworth alone proved the will; but Thomas Hutton renounced probate and declined to act in the trusts of the will; and by indenture of release, dated 23d December, 1816, made and executed between Hutton and Christopher Wordsworth, and William Wordsworth, he bargained, sold, released, quitclaimed and conveyed to them, &c., the premises.

In December, 1816, Christopher Wordsworth and William Wordsworth advertised the premises to be sold by them as devisees in trust, named in the will of R. Wordsworth, at auction, and that the highest bidder, being the purchaser, should be let into possession on the 25th March, then next. In pursuance of said notice John Nicolson was declared to be the

purchaser, at the sum of £305. Nicolson, after signing the memorandum of purchase and undertaking to perform on his part, &c., was unwilling to take the conveyance of the Wordsworths alone, and wished Hutton to join in the conveyance and receipt, and brought his suit for compelling him to do so. The Lord Chancellor, Lord Eldon, remarked: "The question comes before the court in a singular shape. I understand Hutton was not a party to the contract; the plaintiff, therefore, cannot insist on his being a party to the conveyance. If the suit had been instituted by the defendants against the plaintiff, the court must have decided the question whether the defendants could make a good title. The plaintiff has filed his bill for specific performance, himself insisting that his vendors cannot make a good title. When on a bill by a vendee, for specific performance, it appears that the defendants cannot make a good title, there is no further question in the cause than who is to pay the costs." Lord Eldon proceeded to remark, extra-judicially: "The question is curious as a point in conveyancing. It seems to be taken for law from an older period than the date of *Crewe v. Dicken*,¹ and sanctioned by Lord Hale,² that if an estate is conveyed to two persons in trust, and one will not act as trustee, the estate vests in the other. If, therefore, the party executes a simple instrument, and under his hand and seal, declares that he disclaims, that is, dissents from being trustee, the fact must be taken to be that

¹ 4 Ves., 97.

² *Smith v. Wheeler*, 1 Vent., 128; 2 Keble, 772.

he is no trustee. But in *Crewe v. Dicken*, the difficulty occurred that instead of doing this the party conveyed his estate to the other trustees. Lord Loughborough thought that that was different from a mere disclaimer, because he could not execute a release without having assented to the conveyance himself. In that case there were also specialties. The individuals were particularly described and the directions for the form of the receipt were such as made it impossible that a proper receipt could be given, unless the trustee who had disclaimed, joined.

“If the essence of the act is disclaimed, and if the point were *res integra*, I should be inclined to say that, if the mere fact of disclaimer is to remove all difficulties and vest the estate in other trustees, a party who releases, and thereby declares that he will not take as trustee, gives the best evidence that he will not take as trustee. The answer that the release amounts to more than a disclaimer is much more technical than any reasoning that deserves to prevail in a Court of Equity.” Lord Eldon proceeds to remark further, “My opinion is, that if a person, who is appointed co-trustee by any instrument, executes no other act than a conveyance to a co-trustee, where the meaning and intent of that conveyance is disclaimer, the distinction (between release and disclaimer) is not sufficiently broad for the court to act upon. I can find no case which has decided, nor can I see any reason for deciding, that, where the intent of the release is disclaimer, the inference that the releasor has

accepted the estate shall prevent the effect of it. The decree in *Crewe v. Dicken* did not proceed on this point only. The words¹ describing the persons by whom the receipt was to be given were very special;¹ in that case if two out of the three trustees had died, the third having previously released to them, beyond doubt *that* survivor must, under the words, have given the receipt, though he did not continue trustee. I think there is no case in which judgment has been pronounced on the distinction between a disclaimer and a release, and that where the intention is disclaimer there ought to be no distinction." Upon an examination of these cases, there would seem to be no essential difference of principle in the three cases examined at length. In the case of *Crewe v. Dicken*, Lord Roslyn could not find that Sir William Wheeler had disclaimed, or any where signified an intention to disclaim. He had only executed a release, which it would not have been necessary for him to do had he disclaimed; as no estate would then have vested in him. In the case of *Nicolson v. Wordsworth*, Hutton renounced probate, and declined to act in the trusts of the will, and executed a release to the other trustees; and Lord Eldon treated the release of Hutton as, in essence, an act of disclaimer, and as executed for that purpose. When a Court of

¹ Do direct, &c., that the receipt or receipts of the said Sir William Wheeler, Otley Crewe and Thomas Boydell, and the survivor of them, &c., of the purchase money, &c., shall be a full and sufficient discharge, &c., and the purchaser, &c., shall not be further answerable, &c., upon the trusts, &c.

Equity finds clearly what the parties intend to do by the execution of an instrument, in the absence of fraud, &c., they will not hesitate to give effect to that intent, if it be legal and proper. In the case of *Urch v. Walker*, Lord Coltenham, Chancellor, found a wide distinction between that case and the case of *Nicolson v. Wordsworth*. He finds that Blackburrow and Wood professed to act in the trusts of the will, and in virtue of the powers conferred upon them by it; and for the purpose of executing a part at least of the trusts, which they could not do without accepting the trusteeship. From the foregoing it will be seen how important it is that one who does not intend to accept the office of trustee should carefully abstain from any and every act which may tend to fix him with the trust. He should not attempt to act as agent for any of the trustees in the premises, until he has most unequivocally disclaimed, so as to make it impossible for him to be considered as acting in the character of trustee.¹

It is a principle well settled that a trustee cannot limit his acceptance of the trust if he accepts at all. For, if he interfere at all in the management of the trust, he will be deemed to have accepted the entire trust.²

¹ Where several executors are appointed under a will, and invested with general powers, &c., and all decline but one, the powers pass to the one accepting, and he can execute them. *Leggett v. Hunter*, 19 N. Y. Rep., (5 Smith,) 445.

² *Urch v. Walker*, 3 Mylne & Cr., 702; *Doyle v. Blake*, Scho. & Lefr., 231; *Van Horn v. Fonda*; 5 Johns. Ch. Rep., 389; *Champlain v. Givens*, 1 Rice Eq., 154; *Flint v. Clinton Co.*, 12 N. H. Rep., 432; *Lattimer v. Hausen*, 1 Bland., 51; *Cummins v. Cummins*, 3 J. & Lat., 64.

But, in case two persons are named as trustees, and one of them renounces and disclaims, afterward he may act as the agent of the one who accepts the trust without making himself responsible as trustee. The principle is a plain one; by the disclaimer the entire estate is vested in those who accept the trust, and cannot afterwards be divested by the acts of the disclaiming party. Thus, in the case of *Dove v. Everard*,¹ Everard and Manby were appointed trustees by the testator; but Everard being a creditor, declined and renounced the trust; but afterwards took an active part as the agent of Manby, in the conversion of the assets into money, &c., and accounted with Manby. The court held that Everard having renounced, &c., had not made himself liable as trustee. In the case of *Lowry v. Fulton*,² a testator, resident in India, appointed Lowry, Casement and Fulton his executors and trustees. Casement proved the will in India. James Lowry proved the will in England. Fulton never proved the will. Fulton, at the time of the testator's death was a partner in the house of Mackintosh and company, Calcutta, who were the testator's bankers and money agents. Shortly after the death of the testator, Fulton retired from the partnership, and

¹ Russ. & Mylne, 231; *Graham v. Kebele*, 2 Dow. P. C., 17; *Kilby v. Stanton*, 2 Young & J., 75; also 2 Williams' Exr., 1291-1301; see also *Webster v. Vandeventer*, 6 Gray, 428; see also *Ochiltree v. Wright*, 1 Dev. & Bat., 336.

² 9 Sim., 115; see also Lewin on Trusts, p. 231; *Stacy v. Elph*, 1 M. & K., 195; *Dove v. Everard*, 1 Russ. and Mylne, 231; *Orr v. Newton*, 2 Cox, 274.

removed to England, where he entered into partnership with Richards, Mackintosh and company, London, who were the correspondents and agents of Mackintosh and company, Calcutta. Ten years after this he died, without ever having proved the will. While a member of the firm in London, he paid some of the testator's legacies to persons in England; and in order to satisfy a legacy given by the testator upon certain trusts, he invested the amount in stock in the names of Casement and himself, as trustees; but the payments, &c., were made by the direction of Casement, and out of remittances sent by him to the firm of Richards, Mackintosh and company. Mackintosh and company, Calcutta, failed, and it was sought to charge the estate of Fulton, upon the ground that he had accepted and acted in the trust of the will. But the Court were of the opinion that Fulton had only acted as the agent of Casement, and not as an executor or trustee of the will, and consequently that he was not responsible for losses occasioned to the estate by the failure of M. & Co.

The disclaimer, to make it safe for one who does not intend to accept the trust, to act as the agent of the trustee, must be such an one as vests the estate in those who accept the trust. A mere refusal to act may not be sufficient. Thus, a trustee of real estate appointed by will, may assert his interest in the estate, and proceed to execute the trust at any time, although he had previously refused to accept the trust, if he has not released his estate

and interest to the other trustee, or executed a deed of disclaimer.¹

And as a disclaimer, which vests the estate in those who accept the trust, puts it out of the power of the renouncing trustee to reinvest himself with the estate and character of trustee, so, likewise, when a party has once fixed himself as trustee by acts which amount to an implied acceptance of the trust, he cannot afterwards divest himself of that character by disclaimer or renunciation² without the consent of the cestuis qui trust, or the sanction of the court.³

It is impossible to consider in this work all the cases that have been adjudicated on this subject. The acts by which a nominated trustee may fix upon himself the character and responsibilities of a trustee are so various that they cannot be specified in detail, especially as each fact is to be interpreted in the light of circumstances attending upon it. Thus, if a person, having notice of his appointment as trustee, should continue to receive the income

¹ *Judson v. Gibbons*, 5 Wend., 224; 1 Cruise, 539; 10 B. Monroe, (Kent,) Rep., 327; but see *Townson v. Tickell*, 3 B. & A. 36; *Bonifant v. Greenfield*, Cro. Eliz., 80; *Bingham v. Clanmorris*, 2 Moll., 253; but see *Burritt v. Silliman*, 3 Kern., 93.

² *Doyle v. Blake*, 2 Scho. & Lefr., 231; *Stacy v. Elph*, 1 M. & K., 196; *Conyngham v. Conyngham*, 1 Ves., 522; *Cruiger v. Halliday*, 11 Paige, 319; *Chaplin v. Givens*, 1 Rice Eq., 133; *Shepherd v. McEvoy*, 4 J. C. Rep., 136.

³ *Lewin on Trusts*, 260, 465; 4 Kent's Com., 311; *Doyle v. Blake*, 2 Sch. & Lefr., 230, 245; *Bradford v. Belfield*, 2 Sim., 264; *Chalmer v. Bradley*, 1 Jac. & Walker, 51, 68; *Moran v. Hays*, 1 J. C. R., 339; *Shepherd v. McEvers*, 4 Johns. Ch. R., 136; *Willis on Trustees*, 144; *Bampton v. Birchall*, 6 Lond. Jour., 815; *Strong v. Willis*, 3 Florida Rep., 131; *Latimer v. Hauson*, 1 Bland., 51.

arising from the trust estate, without first having unequivocally renounced the trust, he would be deemed to have accepted it. This was the case in *Conyngham v. Conyngham*;¹ or if he interfere with the management of the trust property, by ordering it to be sold, and giving directions, implying authority or ownership.² Again, where a person was present when an instrument was read, by which he was made trustee, and he tacitly acquiesced in the appointment, his assent is so strongly presumed that a very slight meddling with the affairs of the trust would fix upon him the responsibilities of trustee.³ The rule is this: Where there is a voluntary interference with the subject matter of the trust, by the person nominated, that interference will convert the person into a trustee, unless such interference is not palpably referable to some other ground than the execution of the trust.⁴

It has been stated that where a trust is created by will, and the same person is appointed executor and trustee, the probate of the will by him would be deemed an acceptance of the trust.⁵ But merely proving the will without doing anything more, is not sufficient to constitute a person an

¹ 1 Ves., 522; see *Lord Montfort v. Lord Cadogan*, 19 Ves., 638.

² *James v. Frearson*, 1 N. C. C., 375.

³ *Idem*, 1 N. C. C., 375; see also *Harrison v. Graham*, 1 Pr. Wms., 241, n., 6th ed.; *Saddler v. Hobbes*, 2 Bro. Ch. C., 114; *Hanbury v. Kirkland*, 3 Sim., 265; *Penny v. Davis*, 3 B. Monr., 314; *Balehen v. Scott*, 2 Ves., 678; *Lewin on Trusts*, 226.

⁴ *Lewin on Trusts*, 231.

⁵ See *Clark v. Parker*, 19 Ves., 1; *Mucklow v. Fuller*, Jacob, 198; *Booth v. Booth*, 1 Beav., 128; *Ward v. Butler*, 2 Moll., 533.

acting executor.¹ But, if the will clothe the executorship with special trusts, as where a testator directs that his "executors" shall get in certain outstanding effects to be applied to a particular purpose, a person cannot make himself executor by proving the will, and then exempt himself from the trusts expressly annexed to the office,² and if an executor be also trustee of real estate, he cannot desert the situation of trustee and accept only that of executor; the acting as executor is an acceptance of the entire trusteeship.³

In many of the States the statute requires the trustee and executor to give security before entering upon the duties of the office, and in such cases there is a modification of the rule, as to an acceptance of the trust.⁴

It has been held that, after a lapse of years, the acceptance of the trust by the trustee named in the instrument will be presumed, even where he had never executed the trust deed or done any act by which such an acceptance could be inferred.⁵ But this presumption may be rebutted by a disclaimer at any time.

¹ *Balchen v. Scott*, 2 Ves., 678, and Sumner's note, (1,) and authorities; *Hovey v. Blakeman*, 4 Ves., 607.

² *Lewin on Trusts*, 230; *Mucklow v. Fuller*, Jac., 198.

³ *Lewin on Trusts*, *ut supra*; *Ward v. Butler*, 2 Moll., 533; *Worth v. McAdin*, 1 Dev. & Batt., N. Car. Rep. Eq., 208; *Sears v. Dillingham*, 12 Miss. 80; *Van Horn v. Fonda*, 5 J. Ch. Rep., 403.

⁴ See *Carter v. Carter*, 10 B. Monroe, Ky. Rep., 327; *Monroe v. James*, 4 Mumf., 195; but see *Robertson v. Gains*, 2 Humph., 381; *Miller v. Mutch*, 8 Barr, 417; *Roseboom v. Mosher*, 2 Denio, 61; *Williams v. Cushing*, 34 Maine, 370; *Deering v. Adams*, 37 Maine, 265.

⁵ *In re Uniacke*, 1 Jones & Lat., 1; also *re Needham*, *id.*, 32.

Since a party, who is deemed to have accepted the trust, and taken upon himself the duties, powers and responsibilities of trustee, can, by no act of his own, divest himself of the office, it follows that a disclaimer must be construed to have been made at the time of the creation of the trust. For, if the estate has actually vested in the trustee so as to require any act on his part to divest himself of it, a disclaimer will be of no avail.¹ Hence, in determining the question as to time, when the estate vests in the nominated trustee, the law relates to the time the gift was made or the trust was created. It is, therefore, immaterial at what time the acceptance or disclaimer is formally manifested, they will be deemed to have been actually made at the time the trust was declared and the trustee appointed.² When the trustee has been invested with the legal fee in the trust property, either by his express or implied assent, the law casts the estate upon the heir immediately upon the death of the ancestor, unless by some special provision of statute the law gives it a different direction,³ and in such case the heir cannot divest himself of the trust by a mere disclaimer, because the law casts the estate upon him. But should he wish to be relieved from the

¹ *Reed v. Truelove*, Ambl., 417; *Stacy v. Elph*, 1 M. & K., 195; *Shepard v. M'Ever*, 4 J. Ch. R., 136; *Crugar v. Halliday*, 11 Paige, 314; *Chaplin v. Givens*, 1 Rice Eq., 133.

² *Conyngham v. Conyngham*, 1 Ves., 522; see *Stacy v. Elph*, 1 M. & K., 198.

³ *Coke Litt.*, 9, *a*; also 3 *Cruise Dig.*, 318; *Rev. Stat., Maine*, "Testamentary Trustees," ch. 3, sec. 5; *N. Y. Rev. Stat.*, 5th ed., tit. "Uses and Trusts," sec. 87; *Wisconsin R. S.*, 1858, ch. 84, sec. 24, p. 531, &c.

burdens and responsibilities of the trust, it would be his duty to apply to the proper court where the needed relief might be obtained.

We have already seen that where the will clothes the executorship with special trusts, that a person cannot make himself an executor by proving the will, and then renouncing the trusts connected with the office. So, likewise, when the subject matter of the trust is personal estate, the probate of the will of the trustee immediately vests in the executor, all his testator's trust estates; and, on taking probate of the will, he cannot disclaim these trusts; but if he wishes relief he must come into court and obtain their discharge.¹

Mr. Hill, in his excellent work on Trustees,² remarks that "it does not appear to have been ever decided whether the heir or personal representative of a trustee, who, during his life, had never acted or assented to the trust, can disclaim the trust after his death." "However," he says, "in the absence of any express decision on the subject, it is submitted that, upon principle, a disclaimer by the heir or personal representative of a donee in trust, may well be supported when the original donee has done no act in his life time to testify his acceptance of the trust. Wherever such a question could arise, it would almost invariably be found that the trust estate is limited to the heir or representative of the original nominee, and where the persons to take the estate by representation to the original trustees are

¹ Hill on Trustees, p. 223.

² Pages 221, 222; see *Goodson v. Ellison*, 3 Russ., 583.

so designated that there does not seem to be any valid reason why they should not also take the power to repudiate the gift equally with their original trustee, provided that power has not been defeated by any previous act of the latter. And, even where there are no such words of limitation of the trust estate, the estate of the heir or personal representative is merely a continuance of the previous estate; and as part of that estate consisted of the power or right to call the office of trustee into existence by an act of acceptance, or to repudiate it by a proper act of dissent, the continuance of that estate in the heir or representative would not be perfect if it came to them shorn of that power or right. The argument derived from the absurdity and injustice of forcing a person to accept an estate against his will, applies with equal force to the heir and personal representative as to the original donee.”¹

It has sometimes been contended that a disclaimer by parol would not be sufficient where the freehold was in question. But it must be remembered that any conveyance which depends upon the act of the parties, is imperfect for vesting the title, without the assent of the parties, either expressed or implied. That a gift even is not perfect at law until ratified by the assent of the donee.² Therefore, before the title to the trust estate can vest in the trustee, he must assent to it impliedly at least.

¹ See preceding note.

² *Townson v. Tickell*, 3 B. & Al., 31; *Peppercorn v. Wayman*, 13 Eng. L. and Eq. R., 199; *Bigbee v. Cook*, 2 Bing., (N.C.) 70; *Adams v. Taunton*, 5 Madd., 435.

But where the trustees refuses expressly to accept the trust, or to have anything to do in the management of its affairs, there can be found no assent to the trust, either in express terms or by implication.¹

But the disclaimer must be unconditional and unequivocal. Any claim to the estate, from whatever source or of whatever character, will vitiate the disclaimer. If a trustee, therefore, intends to accept or refuse the trust, he should manifest that intention in a manner to remove all doubt, at the earliest time possible after he has been informed of his nomination; and if he fails to do so, he must not be surprised if his doubtful conduct in the premises is construed most strongly against him. Should he be in doubt as to the course he ought to pursue, he should first settle all those doubts before acting. It is held, however, that a trustee cannot be estopped from accepting the trust and entering upon its execution, until he has released or executed a deed of disclaimer.² That a simple refusal to act is not sufficient.²

Mr. Hill remarks in his work on Trustees,³ "that the greatest care should be taken in the framing and wording a deed of disclaimer, lest its execution should have a directly contrary effect to that intended by the party, and thus fix him with an ac-

¹ *Smith v. Wheeler*, 1 Ventr., 128; *Rex v. Wilson*, 5 Man. & K., 140; *Doe, Ex. dem. Smith v. Smith*, 6 B. & Cr., 112.

² *McCubbin v. Cromwell*, 7 G. & J., 165; *Judson v. Gibbons*, 5 Wend., 226.

³ Hill on Trustees, 225. As to what conduct amounts to a disclaimer, see *Stacy v. Elph*, 1 M. & K., 195; *Ayers v. Weed*, 16 Conn., 291; *Thornton v. Winston*, 4 Leigh, 152; *Moore v. Perry*, 2 Murph., 85.

ceptance of the trust when it was his object to renounce." "For this purpose the deed should merely recite the deed or will by which the disclaiming party was appointed trustee, and after stating that the disclaiming party had never executed the instrument (if a deed), and had never assented to or accepted or acted in the trust, and never intended to do so, it should witness that he had, and thereby did absolutely renounce and disclaim the estate and trust expressed to be given or reposed in him by the deed or will. The introduction or addition of any release or conveyance of the trust estate to the co-trustees or to any other party, or the addition of any expressions, which could be construed to have that operation should be carefully avoided. For this reason the disclaimer should be made simply and absolutely, and should not be expressed to be made unto the co-trustees or *cestuis que trust*, as is sometimes done.¹

What shall be deemed an acceptance or disclaimer of the trust by the trustee in certain cases, has been regulated by statute in many of the States.

As to the effect of a valid disclaimer, it is evident that the parties are left as though the disclaiming party had not been nominated. The title in the subject matter of the trust will be vested in those who accept the trust;² or, if there are none, then in case of a deed or grant, the title will remain in the grantor; or in the case of a will, in the heir-at-law, or personal representatives, according as to

¹ See preceding note.

² *Leggett v. Hunter*, 19 N. Y. Rep., (5 Smith,) 445.

whether it be real or personal estate. Thus, when one of several trustees disclaims, the entire estate is vested in the other trustee or trustees, the same as though the disclaiming party had not been named in the trust instrument.¹ But where a sole trustee disclaims, or when all the trustees do so, the legal estate vests in heir of the devisor, when the trust is of real estate; and in the personal representative, when of personal estate.²

¹ *Thompson v. Leach*, 2 Ventr., 198; *Dann v. Judge*, 11 East, 288; *Bonifant v. Greenfield*. Cro. Eliz., 80; *Taylor v. Galloway*, 1 Hamm., 232; *Jones v. Moffet*, 5 S. & R., 523; *Smith v. Shackelford*, 9 Dana, 452; *P. F. School v. Fisher*, 30 Maine, 520; *King v. Donnelly*, 5 Paige, 46; *Leavans v. Butler*, 8 Porter, 380; *Leggett v. Hunter*, 19 N. Y. Rep., 445.

² *Stacy v. Elph*, 1 M. & K., 195.

CHAPTER IV.

THE OFFICE OF TRUSTEE, AND ITS
GENERAL PROPERTIES.

The office of trustee is characterized by certain properties which pertain thereto, and are inseparable therefrom: and the first is—

1. That where a person has actually or constructively accepted and undertaken the office, he cannot, by his own act, discharge himself from subsequent liability. No person can be compelled to undertake such an office, and assume its responsibilities. But having undertaken them, there is no way to obtain a discharge except by faithfully executing the trust; or by application to the proper court; or by virtue of some special power contained in the instrument creating the trust; or by the consent of all parties interested therein.¹

¹ See Lewin on Trusts, p. 289; *Doyle v. Blake*, 2 Sch. & Lef., 245; *Chalmer v. Bradley*, 1 J. & W., 68; *Lowrey v. Fulton*, 9 Sim., 123; *Reed v. Truelove*, Ambl., 417; *Shepherd v. McEvers*, 4 John. Ch., 136; *Diefendorf v. Spraker*, 6 Seld., 246; *Switzer v. Skiles*, 3 Gilman (Ill.), 529. Where all the *cestuis que trust* are of full age and free from disability, their assent will be sufficient. But where there are infants or *femes covert*, or trusts for children not *in esse*, etc., if the trustee would be discharged he must apply to the court and show cause, etc. *Matter of Jones*, 4 Sandf. Ch. 615; *Cruger v. Holliday*, 11 Paige, 314; *Courtenay v. Courtenay*, 3 Jones & Lat., 529. In New York, by provisions of R. S., vol. III, p. 22, sec. 88, trustee by petition to the Supreme Court, may resign, and will

2. A second property of the office of trustee is, that being one of *personal confidence*, it cannot be delegated to another. This is a well established principle, in the administration of trusts.¹ But there are cases where trustees and executors are justified in administering the trust through the aid or instrumentality of others.² In the case of *ex parte Belchier*,³ Lord Hardwick remarked "there are two sorts of necessity; first, a legal necessity; and secondly, a moral necessity. As to the *legal* necessity, a distinction prevails. Where two executors join in giving a discharge for money, and one of them only receives it, they are both answerable, because there is no necessity for both to join in the discharge, the receipt of either being sufficient. But if trustees join in giving a discharge, and one only receives, the other is not answerable, because his joining in the discharge was necessary. *Moral* necessity is from the usage of mankind. If the

be discharged upon such terms, and under such regulations as the Court may require and establish, etc. See the particular provisions in the several States as set forth in sec. 3. ch. 1, div. 2, commencing ante, p. 391.

¹ Hill on Trustees, p. 175; *Chalmers v. Bradley*, 1 J. & W., 68; *Turner v. Corney*, 5 Beav., 517; *Walker v. Symonds*, 3 Swn., 79; *Lord Braybrook v. Inskips*, 8 Ves., 417; *Alexander v. Alexander*, 2 Ves., 643; *Adams v. Clifton*, 1 Russ., 297; *Chambers v. Minchin*, 7 Ves., 196, per Lord Eldon; *Bradford v. Belfield*, 2 Sim., 264; *Truteh v. Lamprell*, 20 Beav., 116; *Thompson v. Finch*, 22 Beav., 316; *Andrew v. New York Bible Society*, 4 Sand., 156; *Niles v. Stevens*, 4 Denio, 399; *Newton v. Bronson*, 3 Kern., 587; *Beekman v. Bonsor*, 23 N. Y. Rep., 298.

² But see *Lewis v. Reed*, 11 Ind., 239; *Mason v. Wait*, 4 Scam., 132.

³ *Ambl.*, 219; see also *Bacon v. Bacon*, 5 Ves., 335; *Clough v. Bond*, 3 M. & Cr., 497; *Joy v. Campbell*, 1 Sch. & Lef., 341; *Chambers v. Minchin*, 7 Ves., 193; *Davis v. Spurling*, 1 R. & M., 66; *Munch v. Cockerell*, 5 M. & Cr., 214. But in case of assignee of a bankrupt being liable by the attorney absconding, etc., see *ex parte Townsend*, 1 Moll., 186.

trustee acts as prudently for the trust as he would have done for himself, and according to the usage of business, as if he appoint rents to be paid to a banker at that time in credit, but who afterwards breaks, he is not answerable; so in the employment of stewards and agents; for none of these cases are on account of necessity, but because the trustee acted in the usual methods of business.”¹

In the case of *Joy v. Campbell*,² Lord Redesdale remarked, “An executor living in London, is to pay debts in Suffolk, and remits money to his co-executor to pay those debts; he is considered to do this of necessity: he could not transact business without trusting some person; and it would be impossible for him to discharge his duty, if he is made responsible where he remitted money to a person to whom he would himself have given credit, and would in his own business have remitted money in the same way. It would be the same were one executor in India, and another in England, the assets being in India, but to be applied in England; there the co-executor is appointed for the purpose of carrying on such transactions, and the executor is not responsible: for he must remit to somebody, and he can

¹ See preceding note.

² 1 Sch. & Lef., 341; see also *Harrison v. Graham*, cited, 1 P. Wms., 241, note (y) (6 ed.); *Chambers v. Minchin*, 7 Ves., 198; see also *Balchen v. Scott*, 2 Ves., Jr., 678; *Churchill v. Hobson*, 1 P. Wms., 241; *ex parte, Griffin*, 2 Gl. & J., 114; *Wackerbath v. Powell*, *idem.* 151; *Kilbee v. Sneyd*, 2 Moll., 186; *Barrings v. Willing*, 4 Wash. C. C. Rep., 251; see also *Jones' Appeal*, 8 W. & S., 147; *State v. Guilford*, 15 Ohio, 593; *Deaderick v. Cantrell*, 10 Yerg., 264; but see *Maccubin v. Cromwell*, 7 G. & J., 157; *Thomas v. Scruggs*, 10 Yerg., 400.

not be wrong if he remits to the person in whom the testator himself reposed confidence."

But, although, under a *legal* or *moral* necessity, a trustee may employ agents, or make use of the assistance of others, in the transaction of such business as usually requires the like agencies or assistance, and is only liable for such negligence as a prudent man would not be guilty of, yet, where the trust is purely of a *discretionary* character, and that discretion is vested *personally* in himself, he cannot delegate it to any one, not even a co-trustee.¹

3. A third incident of the office of trustee is, where the administration of the trust is vested in co-trustees, they all form but one, as trustees, and must execute the duties of their office jointly.² All who accept the office, are acting trustees: and if, for any cause, any one while continuing trustee, cannot or will not act, it is not competent for the others to proceed without him; and the administration of the trust, in such case, devolves upon the court.³

But one trustee may be constituted the agent of the others in transacting much of the business per-

¹ *Crewe v. Dicken*, 4 Ves., 97; see also *Att'y Gen'l v. Scott*, 1 Ves., 413; *Alexander v. Alexander*, 2 Ves., 643.

² *Shook v. Shook*, 19 Barb., 653; *De Pyster v. Ferrers*, 11 Paige, 13; *Cox v. Walker*, 26 Maine, 504; *Vandever's Appeal* 8 W. & S., 405; *Ridgley v. Johnson*, 11 Barb. S. C., 527; *Sinclair v. Jackson*, 8 Cow., 544; *Franklin v. Osgood*, 14 Johns., 560; *Latrobe v. Tiernan*, 2 Md. Ch. Decis., 480.

³ *Doyley v. Sherrat*, 2 Eq. Ca. Abr., 742; *ex parte*, *Griffin*, 2 Gl. & J., 116; *ex parte* *Belchiér*. Ambl., 219; *Guyton & Shane*, 7 Dana, 498; *Davis v. McNeil*, 1 Ired. Eq., 344; *Ridgley v. Johnson*, 11 Barb., 527; *Wood v. Wood*, 5 Paige, 596; *Matter of Van Wyke*, 1 Barb. Ch., 565; *Matter of Wadsworth*, 2 Barb. Ch., 381; *Matter of Mechanics' Bank*, ib., 446; *Burrill v. Sheil*, 2 Barb., 457; *Scruggs v. Driver*, 31 Alab., 274.

taining to the office; and he can act for the whole within the scope of such agency. But in such action, he is to be considered as an *agent* of the trustee rather than an individual trustee; and his acts are deemed to be the acts of all, upon the principle of "*qui facit per alium facit per se.*"¹

There is also another apparent exception to the rule. Where there are numerous trustees, and the trust is of a *public* character, the act of the majority is held to be the act of the whole.² In the case of *Wilkinson v. Malin*, Lord Lyndhurst remarked, "In this case there were seven trustees; those seven met for the purpose of electing a schoolmaster; at that meeting five of the trustees concurred in the appointment; two dissented but did nothing upon that dissent. We are of opinion that in a case of this description, where all the trustees were assembled for the purpose of making an election, and the majority of them so assembled concurred in the appointment, the act of the majority in that respect is to be considered the act of the whole body. This is a trust of a public nature, viz: to apply funds for the repair of the church and other objects in which

¹ *Ex parte Rigby*, 19 Ves., 463; *Sinclair v. Jackson*, 8 Cowen, 543; *Bowers v. Seeger*, 8 W. & S., 222; see also *Abbot v. American Hard Rubber Co.*, 33 Barb., 579; see also *Leggett v. Hunter*, 19 N. Y. Rep., (5 Smith,) 445. As to the authority of the court to remove and appoint trustees in the several States, see ante p. 391, *et seq.* See also *Webb v. Ledsam*, 1 Kay & John., 385. An administrator may appoint an agent to sell a title bond. *Lewis v. Reed*, 11 Ind., 239.

² *Wilkinson v. Malin*, 2 Tyr., 544; *Att'y Gen. v. Shearman*, 2 Beav., 104; *Att'y Gen. v. Cuming*, 2 Y. & C. Ch. Ca., 139; *Younger v. Welham*, 3 Sw., 180; *Att'y Gen. v. Scott*, 1 Ves., 413; *Hill on Trustees*, 308; *Lewin on Trusts*, 298.

the whole parish are interested; and we are of opinion that when trustees are appointed for the purpose of performing a trust of such a public and general nature, the act of the majority is the act of the whole. It was said at the bar, that the principle only applies to cases where the trustees are appointed under some public authority, as under an act of parliament, or some public body; but we are of opinion that it is not subject to that limitation. The objects of the trust would be defeated if one dissenting trustee could prevent the application of the funds in the manner directed. Considering the nature of the trusts, we are of opinion it was the intention of the founder, and fairly to be collected from the objects he had in view, that the act of the majority should bind the rest.”¹

It is sometimes provided in the instrument creating the trust, that the duties of the office may be performed by a majority of the trustees, or by a certain definite number of them. The court likewise sometimes orders that a part of the number of trustees shall constitute a quorum for the transaction of business, etc. But in all these cases, the execution of the trust, according to the determination of the majority, is binding upon all; and if any withhold their assent unreasonably, the court, on application, will compel them to execute the trust, or remove them and appoint others in their place.²

¹ See preceding note.

² *Clark v. Parker*, 19 Ves., 1; *Att’y Gen. v. Scott*, 1 Ves., 413; *Lewin on Trusts*, 299; see *Townley v. Sherborne*, Bridg., 35; *Williams v. Nixon*, 2 Beav., 472; *Gouldsworth v. Knight*, 11 M. & W., 337; *Matter of Mechanics’ Bank*, 2 Barb., 446; *Burrill v. Sheil*, 2 Barb., 457. But a majority of

As at law any one of several joint tenants is authorized to receive and give discharges for the rents and incomes arising from the property, so one of several co-trustees of stock in the public funds, may receive the dividends on the whole sum,¹ although all must join in the sale of the *corpus*, or in the conveyance of the estate.²

4. A fourth incident to the office of trustee is, that on the death of one of the co-trustees, the joint office survives.³ Where an authority to perform an act, coupled with an interest, is committed to several persons, and any one of them dies, such authority vests in the survivor or survivors.⁴ This was the law in the days of Lord Coke. For he observes, "if a man deviseth land to his executors to be sold, and maketh two executors, and one of them dieth, yet the survivor may sell the land, because, as the estate, so the trust shall survive: and so note the diversity between a *bare trust* and a *trust coupled with an interest*."⁵ The law in this respect has remained the same since the days of Lord Coke, except, that a *power imperative*, which is a *trust*, whether a *bare power* or one *coupled with an interest*, is deemed to

trustees cannot exclude one of their number, and so divest him of his rights as to make his subsequent acts in obtaining possession of the property, a tort. See *M. E. Ch. of Pultney v. Stewart*, 27 Barb. 553.

¹ *Williams v. Nixon*, 2 Beav., 472; see also *Webb v. Ledsam*, 1 Kay & John., 385; *Gouldsworth v. Knight*, 11 M. & W., 337.

² *Townley v. Sherborne, Bridg.*, 35; *Gouldsworth v. Knight*, *ut supra*.

³ *Stewart v. Petters*, 10 Mo., 755.

⁴ *Butler v. Bray, Dyer*, 189; *Peyton v. Bury*, 3 P. Wms., 628; *Adams v. Buckland*, 2 Vern., 514; *Hudson v. Hudson*, Rep. T. Talb., 127; *Coke Lit.*, 113; *Lane v. Debenham*, 17 Jur., 1005.

⁵ *Coke Litt.*, 113.

be an estate in the trustee and survivors.¹ There is a distinction however, where the committee are regarded in the light of mere bailiffs, without any interest: as a committee of a lunatic's estate. In such case, if one of them die the office is extinguished. So also, if joint guardians be appointed by the court, on the death of one of them the office is at an end.² But it is otherwise with the office of executor, administrator, trustee, etc., for in such cases the estate vested in them is deemed to be an interest, and survives.³

Where several are appointed to the office of trustee, executor, etc., it vests in those only who accept.⁴ So also where one has been discharged from the trust, etc.⁵ But where there are two or more joint

¹ *Dominick v. Sayre*, 3 Sand., 555.

² *Ex parte Lyne*, Rep. T. Talbot, 143; *Bradshaw v. Bradshaw*, 1 Russ., 528; *Hall v. Jones*, 2 Sim., 41.

³ *Adams v. Buckland*, 2 Vern., 514; *Hudson v. Hudson*, Rep. T. Talbot, 129; *Eyre v. Countess of Shaftsbury*, 2 P. Wms., 102; Co. Lit., 113; *Att'y Gen. v. Bishop of Litchfield*, 5 Ves., 825; *Slater v. Wheeler*, 9 Sim., 156; *Lane v. Debenham*, 17 Jur., 1005; *Warburton v. Sandys*, 14 Sim., 622; *Dominick v. Sayre*, 3 Sand., 555; *Belmont v. O'Brien*, 2 Kern., 394; *Shook v. Shook*, 19 Barb., 653; *DePeyster v. Ferrers*, 11 Paige, 13; *Moses v. Murgatroyd*, 1 John. Ch. Rep., 119; *Shortz v. Unangst*, 3 W. & S., 45; *Stewart v. Petters*, 10 Mo., 755; *Powell v. Knox*, 16 Alab., 364; *Parsons v. Boyd*, 20 Alab., 112; but see *Gregg v. Currier*, 36 N. H., 200. In that case it was held, that where the will directed the executor to sell lands, it conferred a *bare power without any interest*, and the estate descended to the heir, etc. See also *Smith v. McConnell*, 17 Ill., 135; *Aubuchon v. Lory*, 23 Miss., 99; *Hopper v. Adees*, 3 Duer, 235; *Barton v. Tunnell*, 5 Harring., 182; *Britton v. Lewis*, 8 Rich. Eq., 271; *Leggett v. Hunter*, 19 N. Y., 445.

⁴ *Leggett v. Hunter*, 19 N. Y. Rep., (5 Smith,) 445; *Davou v. Fanning*, 2 Johns. Ch. Rep., 252; *Matter of Stevenson*, 3 Paige, 420; *King v. Donnelly*, 5 Paige, 46; *Matter of Van Schoonhoven*, ib., 559; *Burton v. Tunnell*, 5 Harring., 182; *Brittan v. Lewis*, 8 Rich. Eq., 271; *Treadwell v. Cordis*, 5 Gray, 341.

⁵ *Grinstead v. Fonte*, 32 Miss., 120.

trustees, and one becomes incompetent through lunacy or other inability, to join in the execution of the trust, the other cannot act alone, but must call in the aid of the court.¹

5. A fifth incident of the office of trustee is, that one trustee shall not be liable for the acts or defaults of his co-trustee.² Co-trustees were formerly considered responsible for money, where they joined in signing a receipt for it. But that rule has, latterly, been discarded; because where the administration of a trust is committed to co-trustees, a receipt for money paid to the account of the trust must be authenticated by the signature of all the trustees in their joint capacity; and it would be deemed unjust for the law to hold a co-trustee responsible for that act which the nature of his office will not permit him to decline.³ This question was first authoritatively settled in the case of *Townley v. Sherborne, ut supra*. In this case, Lord Keeper Coventry called to his assistance several of the justices, etc., and “after long and mature deliberation on the case, and serious advice with all the judges,” declared in open court the resolution of his lordship and of the judges, “that where lands or leases were conveyed

¹ *Matter of Wadsworth*, 2 Barb. Ch. Rep., 381.

² *Townley v. Sherborne*, Bridg., 35; *Leigh v. Barrey*, 3 Atk., 584; *Spalding v. Shalmer*, 1 Vern., 303; *Sadler v. Hobbs*, 2 Bro. C. C., 114; *Brice v. Stokes*, 11 Ves., 324; *Chambers v. Minchin*, 7 Ves., 198; *Gaultney v. Nolan*, 33 Miss., 569; *Kerr v. Waters*, 19 Geo., 136. But see *Spencer v. Spencer*, 11 Paige, 299; *Bowman v. Raineteaux*, Hoff., 150.

³ *Brice v. Stokes*, 11 Ves., 324; *Harden v. Parsons*, 1 Ed., 147; *Westley v. Clark*, 1 Ed., 359; *ex parte Belcher*, Amb., 219; *Lord Shipbrook v. Lord Hinchinbrook*, 16 Ves., 479; *Webb v. Ledsam*, 1 Kay & Johns., 388; *Kip v. Denniston*, 4 Johns., 23.

to two or more upon trust, and one of them receives all, or most part of the profits, and after, dyeth or decayeth in his estate, his co-trustee shall not be charged or be compelled in the Court of Chancery to answer for the receipts of him so dying or decayed, *unless some practice, fraud or evil dealing* appear to have been in them to prejudice the trust; for they being by law *joint tenants* or *tenants* in common, every one by law may receive either all or as much of the profits as he can come by." * * *

"And if two executors be, and one of them waste all or any part of the estate, the devastavit shall by law charge him only, and not the co-executor. And in that case *aequitas sequitur legem*, there being many precedents resolved in chancery that one executor shall not answer nor be chargeable for the act or default of his companion. And it is no breach of trust to permit one of the trustees to receive all or most part of the profits; it falling out many times that some of the trustees live far from the lands, and are put in trust for other respects than to be troubled with the receipt of the profits. And although, in all presumption this case had often happened, yet no precedent had been produced to his lordship or the judges, that in any such case the co-trustee had been charged for the act or default of his companion, and therefore it was to be presumed that the current and clear opinion had gone that he was not to be charged, it having not until of late, been brought into question in a case that by all likelihood had often happened. But if upon proofs or circumstances the court should be satisfied that

there had been any *dolus malus*, or any evil practice, fraud or ill intent in him that permitted his companion to receive the whole profits, he should be charged though he received nothing.”

Although a co-trustee, who joins in a receipt for money for conformity’s sake, is not answerable for a misapplication by the trustee who receives it, yet it is incumbent upon him to prove that his co-trustee was the person by whom the money was actually received; and if he fail to do so, he will be jointly charged;¹ for at law, the joint receipt is *conclusive* evidence that the money came to the hands of both; but equity admits of explanation, and will decree according to the justice of the case.²

The reason why co-trustees are not liable for signing a receipt for conformity’s sake, is based upon the principle, that the law makes it his duty to do so, and will not permit him to decline the performance of that duty. If, therefore, a co-trustee sign where the purposes of the trust do not require that he should do so, he will render himself liable.³ In pursuance of this principle, courts have been dis-

¹ Brice v. Stokes, 11 Ves., 234; Scurfield v. Howes, 3 Bro. C. C., 95; Westley v. Clarke, 1 Ed., 359; see also Fellows v. Mitchel, 1 P. Wms., 83; Jones’ Appeal, 8 W. & S., 147; Monell v. Monell, 5 Johns. Ch., 283; Deaderick v. Cantrell, 10 Yerg., 264; Manahan v. Gibbons, 19 Johns., 427.

² Harden v. Parsons, 1 Ed., 147; Manahan v. Gibbons, 19 Johns., 427; Monell v. Monell, 5 J. Ch. Rep., 283; Kip v. Deniston, 4 Johns., 23; Sterrett’s Appeal, 2 Penn. St. Rep., 419.

³ Hanbury v. Kirkland, 3 Sim., 265; Rowland v. Witherden, 3 Mac. & Gord., 568; Broadhurst v. Balguy, 1 Y. & C. Ch. Ca., 16; Johnson v. Johnson, 2 Hill’s Eq., 290; Jones’ Appeal, 8 W. & S., 147; Clarke v. Jenkins, 3 Rich. Eq., 318; Monell v. Monell, 5 J. Ch. Rep., 288; Duncomon’s Appeal, 17 Penn. St. Rep., 270.

posed to make a distinction between co-trustees and co-executors. Although, as a general principle, executors are not responsible for the acts and defaults of their co-executors, yet in respect to signing receipts, courts have made a distinction. It is held, that each executor has full control over the personal assets of the testator; and that the law does not require his co-executor to join in the receipt for money, etc. If, therefore, an executor join with his co-executor in a receipt, he interferes when the nature of his office lays no such obligation upon him, and he does a voluntary and unnecessary act, for which he is held answerable.¹ But this seems to be an extreme statement of the doctrine. The fact that a co-executor joins unnecessarily in a receipt for the payment of money furnishes stronger proof against him than though the nature of his office *required* him to do so; yet, such fact is not deemed conclusive against him; for he may shew that the money came into the hands of his co-executor without his agency or control, and that the signing of the receipt on his part was merely nugatory.² There has been much discussion of this question in the English courts. In the case of *Westley v. Clark*, Lord Northington took the

¹ Lewin on Trusts, 310; *Murrell v. Cox*, 2 Vern., 560; *ex parte Belcher*, Ambl., 219; *Darwell v. Darwell*, 2 Eq. Ca. Abr., 456; *Duncommun's Appeal*, 17 Penn. St. Rep., 270; *Jones' Appeal*, 8 W. & S., 147; *Manahan v. Gibbons*, 19 Johns., 427.

² *Westly v. Clark*, 1 Ed., 357; S. C., 1 Dick, 329; *Scurfield v. Howes*, 3 Bro. C. C., 94; *Hovey v. Blakeman*, 4 Ves., 468; *Joy v. Campbell*, 1 Sch. & Lefr., 242; *Stell's Appeal*, 10 Barr, 152; *McNair's Appeal*, 4 Rawle, 155; *Ochiltree v. Wright*, 1 Dev. & Batt. Eq., 336.

broad ground, that the rule, that executors joining in a receipt were all liable, amounted to no more than that such joint receipt was *stronger evidence of their joint possession and control* than in cases where such joining was necessary. Although at law, such joining in the receipt was conclusive against the executor, “yet where it appeared plainly that *one executor only* received and discharged the debt, and the others joined afterwards, without any reason, and without being in a capacity to control the act of their co-executor, either before or after the act was done, what ground has any court, in conscience to charge him? Equity arises out of a modification of *acts*, where a very minute circumstance may make a case equitable or iniquitous; and, though former authorities may and ought to bind the determination of subsequent cases with respect to *rights*—as in the right of curtesy or dower—yet, there can be no rule for the future determination of this court, concerning the *acts* of men. The only act that affected the assets was the first that discharged the debt, and, according to the sense of the bar, transferred the legal estate of the lands. Then *that act* the co-executors are not to answer for; the *second act* is nugatory.”¹

On the other hand the doctrine and reasoning of Lord Northington has been questioned. Lord Eldon remarked, that the old rule by which executors had been held liable for joining in a receipt, etc., had

¹ Westley v. Clark, 1 Ed., 357; S. C., 1 Dick, 329; see also Scurfield v. Howes, 3 Bro. C. C., 94; Re Fryer, 3 Jur. N. S., 485.

been *pared down*, but in his opinion, the notion upon which the latter cases had proceeded, viz: that the old rule had a tendency to discourage executors from acting, was very ill-founded. He thought, a plain general rule, which once laid down, was easily understood and might be generally known, was much more inviting to executors than a rule referring everything to the particular circumstances.¹

From a careful examination of the authorities, this principle would seem to be deducible. The executor is liable for any act by which he reduces any part of the testator's property into the possession of his co-executor; and, that the joining in a receipt will render him liable, whenever it is deemed to be such an act.²

Where a bill of exchange had been remitted to two agents, payable to them personally, and, on the death of their principal, they were made his executors; one of them, to enable the other to receive the money, endorsed to him the bill: It was held that such endorsement did not operate to charge him, because the endorsement was absolutely necessary;³

¹ See *Chambers v. Minchin*, 7 Ves., 198; *Brice v. Stokes*, 11 Ves., 325; *Shipbrook v. Hinchinbrook*, 16 Ves., 479; *Walker v. Symonds*, 3 Sw., 64; see also *Doyle v. Blake*, 2 Sch. & Lef., 243; *Joy v. Campbell*, 11 Ves., 325; *Sadler v. Hobbs*, 2 Bro. C. C., 14.

² See *Doyle v. Blake*, 2 Sch. & Lef., 231; *Lees v. Sanderson*, 4 Sim., 28; *Townsend v. Barber*, 1 Dick, 356; *Sadler v. Hobbs*, 2 Bro. C. C., 14; *Clough v. Dixon*, 8 Sim., 594, and 3 M. & C., 490; *Moses v. Levi*, 3 Y. & C., 359; *Kilbee v. Sneyd*, 2 Moll., 200; *Hovey v. Blakeman*, 4 Ves., 608; *Spencer v. Spencer*, 11 Paige, 299.

³ *Hovey v. Blakeman*, 4 Ves., 608; and see *Chambers v. Minchin*, 7 Ves., 197; *Murell v. Cox*, 2 Vern., 570; *Shipbrook v. Hinchinbrook*, 11 Ves., 254; S. C., 16 Ves., 479; but see *Kilbee v. Sneyd*, 2 Moll., 186, 200, 213.

and, it might have been added, the endorsement was not in his character as executor.

In the case of *Townley v. Sherborne*,¹ Lord Keeper Coventry, with the advice of all the judges, while declaring that the trustee should not be held responsible for signing the receipt with his co-trustee, because he was, in so doing, performing an act which the "nature of his office would not permit him to decline," laid down the rule, "that if, upon the proofs or circumstances, the court should be satisfied that there had been any *dolus malus*, or any evil practice, fraud, or ill-intent in him that permitted his companion to receive the whole profits, he should be charged though he received nothing."¹ It is, therefore, held that the trustee may be liable for the acts of his co-trustee, or rather, perhaps, for his own criminal laches and neglect, by which he permits his co-trustee to commit frauds upon, or squander the trust estate. Lord Eldon stated the law in this respect very clearly in the case of *Brice v. Stokes*.² In that case, two trustees, Moor-
ing and Fielder, conveyed the estate to a purchaser in 1784, and both signed the receipt, but Fielder alone received the money. Ten years after Fielder

¹ *Bridg.*, 35; see also *Kilbee v. Sneyd*, 2 Moll., 203, 213; *Moyle v. Moyle*, 2 R. & M., 710; *Evans' Estate*, 2 Ashm., 470; *Ringgold v. Ringgold*, 1 H. & G., 11; *Pim v. Downing*, 11 S. & R., 71.

² *Brice v. Stokes*, 11 Ves., 319; see *Walker v. Symonds*, 3 Sw., 1 and 74; *Kilbee v. Sneyd*, 2 Moll., 186, also 200 and 213; see also *Handbury v. Kirkland*, 3 Sim., 265; *Broadhurst v. Balguy*, 1 Y. & C. Ch. Ca., 16; see *Clough v. Dixon*, 8 Sim., 594, and 3 M. & Cr., 490; *Spencer v. Spencer*, 11 Paige, 299; *Weigand's Appeal*, 28 Penn. St. Rep., 421; *State v. Guilford*, 15 Ohio, 593; *Pim v. Downing*, 11 S. & R., 71.

died insolvent without having accounted for the money, and Mooring was cognizant of the misemployment of the fund, but took no active measures for recovering it out of the hands of his co-trustee. Lord Eldon said: "Though a trustee is safe if he does no more than authorize the receipt and retainer of the money, so far as the act is within the due execution of the trust; yet, if it is proved that a trustee, under a duty to say his co-trustee shall not retain the money beyond the time during which the transaction requires a retainer, admits that, with his knowledge, and therefor with his consent, the co-trustee has not laid it out according to the trust, but has kept it or lent it in opposition to the trust, and the other trustee permits that for ten years together, the question then turns upon this, not whether the receipt of the money was right, but whether the use of it, subsequent to that receipt, after the knowledge of the trustee that it had got into a course of abuse. As soon as a trustee is fixed with a knowledge that his co-trustee is misapplying the money, a duty is imposed upon him to bring it back into the joint custody of those who ought to take better care of it."¹

Inasmuch as the trustee, if he would avoid liability on account of his co-trustee, must be guilty of no "*dolus malus*," or any evil practice, fraud, or ill-intent; if, therefore, he is cognizant of any breach of trust, committed by a co-trustee, and conceal it, or does not immediately take active measures to

¹ See preceding note.

protect the interest of the *cestui que trust*; or if a breach of trust is threatened, and he does not take the necessary means to prevent it, he will be deemed guilty of a breach of trust himself, and be held answerable for the consequences of the same.¹ So, likewise, where a trustee suffers the funds to pass improperly into the hands of his co-trustee, or where he leaves his co-trustee in the exclusive charge of the trust property and the execution of the trust, he has been held liable.²

In Georgia, in the case of *Cleghorn v. Love*, a *query* was raised, whether, if one trustee committed a breach of trust on which an account was decreed, the court could so mould its proceedings as to require the guilty party to respond *first*. In New York it was held, that where stock held by two trustees, was disposed of under a *joint* power, both were *ultimately* liable; but that the one who received the proceeds should be *primarily* so.³

A co-executor or co-trustee may become liable from gross laches in not securing properly the trust property. Thus, a testator bequeathed to his daughter the interest on the bond of one whom he appointed one of his executors, which interest was to be paid annually during her life; and the testa-

¹ *Boardman v. Mosam*, 1 Bro. C. C., 68; *Brice v. Stokes*, 11 Ves., 319; *Blackwood v. Borrowes*, 2 Conn. and Laws, 477; *Walker v. Symonds*, 3 Sw., 41; *Booth v. Booth*, 1 Beav., 125; *Williams v. Nixon*, 2 Beav., 472; *Mumford v. Murry*, 6 Johns. Ch., 1 and 452; *Ringgold v. Ringgold*, 1 H. & G., 11. Slight suspicion is not sufficient. *Jones' Appeal*, 8 W. & S., 147.

² *Bowman v. Raineteaux*, Hoff., 150; *Mumford v. Murray*, 6 Johns. Ch., 1, 452.

³ *Cleghorn v. Love*, 24 Geo., 583; *Spencer v. Spencer*, 11 Paige, 299.

tor directed his executors to secure the principal. Eighteen years after the death of the testator, the obligor of the bond died insolvent, no steps having been taken to secure the principal of the bond. The co-executor was held to be liable to the legatees, because it was their joint duty to have secured the principal.¹

6. A sixth general property of the office of trustee is, that trustees shall not derive any personal advantage from the administration of the property committed to their charge. A trustee may purchase from the *cestui que trust*, provided there is a distinct and definite contract, and one in which there is no fraud, no concealment of information acquired by him in his character as trustee, and no other advantage taken. But the contract must be such as will appear fair, after the most jealous examination.² The incapacity of a trustee to purchase from his *cestuis que trust* proceeds upon the principle that the trustee is in a situation which gives him exclusive advantages in acquiring a knowledge or information respecting the trust property; and the policy of the law forbids that one in that situation should be

¹ Weigand's Appeal, 28 Penn. St. Rep., 421; see Challan v. Shippan, 4 Hare, 452; Evans' Estate, 2 Ashm., 470; Pim v. Downing, 11 S. & R., 71; State v. Guilford, 15 Ohio, 593.

² *Ex parte* Lacy, 6 Ves., 226; *ex parte* Bennett, 10 Ves., 394; Herne v. Meeres, 1 Vern., 465; Scott v. Davis, 1 M. & Cr., 87; Coles v. Trecothick, 9 Ves., 234; Morse v. Royal, 12 Ves., 372; Lyon v. Lyon, 8 Ired. Eq., 201; Pennock's Appeal, 14 Penn. St. Rep., 446; Burch v. Lautz, 2 Rawle, 392; Harrington v. Brown, 5 Pick., 519; Dunlap v. Mitchel, 10 Ohio, 117; Jones v. Smith, 33 Miss., 215; Bolton v. Gardner, 3 Paige, 273; Stuart v. Kissam, 2 Barb., 493; but see Trustees for Sale, Ames v. Downing, 1 Bradf., 321; Sallee v. Chandler, 26 Miss., 124; Smith v. Isaac, 12 Mo. Rep., 106.

under the temptation to sacrifice integrity and violate the requirements of justice. The law, therefore, wisely discountenances all transactions of that character.¹

The extreme strictness of the English law upon this subject may be seen by consulting the opinion of Lord Eldon, in the case of *Webb v. The Earl of Shaftsbury*.² In that case, he directed an inquiry whether the liberty of *sporting* over the trust estate could be let for the benefit of the *cestui que trust*; and, if not, he thought the game should belong to the heir. The trustee might appoint a game-keeper, if necessary, for the preservation of the game, but not to keep up a mere establishment of pleasure.²

Upon the principle that the trustee shall not derive any personal advantage from the administration of the trust property, if an executor or trustee buy in any debt, or discharge any incumbrance to which the trust estate is liable, for a less sum than is actually due thereon, they shall not be entitled to the benefits of such purchase.³ And if trust money

¹ *Baxter v. Costin*, 1 Busb. Eq., 262; *Mason v. Martin*, 4 Md., 124; *Spindler v. Atkinson*, 3 Md., 409; *Andrews v. Hobson*, 23 Alab., 219; *Green v. Winter*, 1 Johns. Ch., 26.

² *Webb v. Earl of Shaftesbury*, 7 Ves., 480; see also *Hutchinson v. Morritt*, 3 Y. & C., 547; see also upon this subject, *Hill v. Bishop of London*, 1 Atk., 618; *Martin v. Martin*, 12 Sim., 579; *Hawkins v. Chappell*, 1 Atk., 621.

³ *Robinson v. Pelt*, 3 P. Wms., 251, note *a*; *ex parte Lacy*, 6 Ves., 628; *Dunch v. Kent*, 1 Vern., 260; *Darcey v. Hall*, 1 Vern., 49; *Fosbrook v. Balguy*, 1 M. & K., 226; *Schoonmaker v. Van Wyke*, 31 Barb., 457; *Quackenbush v. Leonard*, 9 Paige, 334; *Slade v. Van Vechten*, 11 Paige, 21; *Matter of Oakley*, 2 Edw., 478; *Herr's Estate*, 1 Grant's Ca., (Penn.), 272. And a purchaser who purchases knowing the trustee has wrongfully sold to himself, takes the property subject to the trust. *Barksdale v. Finney*, 14 Gratt., 338.

be laid out in buying and selling land, or in stock speculations, or in any commercial adventure, by the trustee or executor, and a profit be made thereby, the advantage goes to the party whose money has been used, and not to the trustee.¹

Upon the like principle, the trustee is not permitted to purchase the property of the *cestui que trust* at auction, without establishing every circumstance necessary to make the transaction good as a private sale.² And, when the trustee has purchased the trust property, either at public or private sale, he takes it subject to the right of the *cestui que trust* to set aside the sale, if he thinks proper,³ or to claim the benefits of it for himself.⁴

As this prohibition is based upon the policy of the law, which considers the trustee to be so situated, in respect to the trust property, as to possess exclusive advantages for acquiring a knowledge and information respecting it, and thus to be under

¹ Fosbrook v. Balguy, 1 M. & K., 226; Docker v. Simes, 2 M. & K., 664; Wedderburn v. Wedderburn, 2 Keen., 722, S. C., 4 M. & Cr., 41; see Parker v. Bloxam, 20 Beav., 295; Schoonmaker v. Van Wyke, 31 Barb., 457; Herr's Estate, 1 Grant's Cas., (Penn.,) 272.

² Campbell v. Walker, 5 Ves., 678; Lister v. Lister, 6 Ves., 631; Sanderson v. Walker, 13 Ves., 601; Beeson v. Beeson, 9 Barr, 279; Bostwick v. Atkins, 3 Coms., 53; Patton v. Thompson, 2 Jones' Eq., 285.

³ Mason v. Martin, 4 Md., 124; Spindler v. Atkinson, 3 Md., 409; Andrews v. Hobson, 23 Alab., 219; Davou v. Fanning, 2 Johns. Ch., 252; see Hendricks v. Robinson, 2 Johns. Ch., 283, 311; Evertson v. Tappan, 5 Johns. Ch., 497; (and the right to avoid the sale passes to the heir or personal representative, Iddings v. Bruer, 4 Sand. Ch., 222;) Ames v. Downing, 1 Brad., 321; Bellamy v. Bellamy's Adm'r, 6 Flor., 62; Charles v. Dubois, 29 Alab., 367; see Smith v. Lansing, 22 N. Y. Rep., 530.

⁴ Schoonmaker v. Van Wyke, 31 Barb., 457; Wiswall v. Stewart, 32 Alab., 433.

temptation to sacrifice integrity, and violate the requirements of justice, when such is not the situation of the trustee, the reason of the prohibition ceasing, the prohibition itself ceases. Thus, where the *cestui que trust* has taken upon himself the conduct of all the preliminary proceedings requisite for the sale, such as the surveys, the mode and conditions of sale, the plans, the choice of the auctioneer, and the like, and the trustee has not been in a situation to acquire any exclusive information respecting the property, if under such circumstances the trustee purchase, he stands upon the same footing with other indifferent persons.¹ For a similar reason, the prohibition to purchase, etc., does not extend to merely nominal trustees, who, practically, have no interest or power as trustees with respect to the trust estate.² In case the trustee wishes to purchase any portion of the trust property during the continuance of his office, he should purchase it under the sanction of the court, or with the full concurrence of the *cestui que trust*, and should purchase under such circumstances as to be able to make it appear that there was no fraud and no concealment of information from his bene-

¹ *Coles v. Trecothick*, 9 Ves., 248; but see *Monro v. Allaire*, 2 Caine's Cas., 183; *Salmon v. Cutts*, 4 DeG. & Sm., 131; see also *Smith v. Lansing*, 22 N. Y. Rep., 530.

² *Parker v. White*, 11 Ves., 226; *Naylor v. Winch*, 1 S. & St., 567; *Sutton v. Jones*, 15 Ves., 587; see *Tucker v. Cocke*, 32 Miss., 184; *Jackson v. Woolsey*, 11 Johns., 446; but see *Gallatian v. Cunningham*, 8 Cowen, 361, aff'g *Galatian v. Erwin*, Hop., 48. Where the relation is presumed to be destroyed under hostile judicial proceedings, he may purchase, etc., see *De Bevoise v. Sandford*, Hoff., 192.

ficiary, which he derived in his character as trustee.¹ Upon the principle that the trustee is not to receive any advantage from his office, he cannot act as a factor, a broker, commission agent, or auctioneer, so as to make for himself any profit from the estate;² neither can he act as solicitor so as to charge the estate for his professional labors, except by special contract.³

In one sense a trustee may, by possibility, reap an advantage from his office, not from any positive right in himself, but from the lack of right in any other to call him to an account. But as this involves no principle peculiar to the office of trustee, it need not be discussed here. This may occur where the line of descent fails, by the death of the *cestui que trust*, without heirs; the trustee will have the enjoyment of the legal owner, for there is no one who can sue out a subpoena against him.⁴

Courts watch with peculiar jealousy all transactions of the trustee, by which he may seek some personal advantage in his management of the trust

¹ *Campbell v. Walker*, 5 Ves., 678; *ex parte Lacy*, 6 Ves., 625; *ex parte Hanes*, 8 Ves., 348; *ex parte Bennett*, 10 Ves., 393; Will. Eq., 187; *Patton v. Thompson*, 2 Jones' Eq., 285; but see *quere Sheldon v. Sheldon*, 13 Johns. 220; (see suggestions in *De Caters v. Le Ray De Chaumont*, 3 Paige, 178;) *Chapin v. Weed*, Clarke, 464; *Slade v. Van Vechten*, 11 Paige, 21; *Stuart v. Kissam*, 2 Barb., 493; *West v. Sloan*, 3 Jones' Eq., 102.

² *Scattergood v. Harrison*, Moseley, 128; *Arnold v. Garner*, 2 Phil., 231; *Sheriff v. Axe*, 4 Russ., 33; *Mathison v. Clarke*, 3 Drew., 3.

³ *More v. Frowd*, 3 M. & Cr., 46; *Fraser v. Palmer*, 4 Y. & C., 515; *York v. Brown*, 1 Coll., 260; *Broughton v. Broughton*, 5 DeGex, M. & G., 160; but see *Lowrie's Appeal*, 1 Grant's Cas., 373; *Ellig v. Naglee*, 9 Cal., 683.

⁴ See *Adams' Doctrine of Equity*, p. 50; but see *Matthews v. Ward*, 10 Gill & John., 443; *Darrah v. McNair*, 1 Ashm., 236; 4 Kent's Com., 425.

estate, or in his dealings with the *cestui que trust*.¹ And the same principle is applicable to all others standing in like fiduciary relations; for no person can be permitted to purchase an interest in property and hold it for his own benefit, where he has a duty to perform in relation to such property, which is inconsistent with the character of purchaser on his own account.²

But, if the *cestui que trust* intends to avail himself of his privilege, he must signify his intention to do so within a reasonable time; for if he defers beyond that, his right of repudiation is gone.³ And if the *cestui que trust* does not see fit to question the sale, the purchaser's title is good; for none other can impeach it,⁴ except, perhaps, the heirs or legal representatives of the beneficiary; and, perhaps, his creditors may be entitled.⁵

¹ Schoch's Appeal, 33 Penn. St. Rep. 351; Landis v. Scott, 32 Penn. St. Rep., 495; Bolton v. Gardner, 3 Paige, 273; Wiswall v. Stewart, 32 Alab., 433; Jones v. Smith, 33 Miss., (4 George,) 215.

² Thorp v. McCullum, 1 Gilman, (Ill.) 615; Ackerman v. Emott, 4 Barb., 626; Richardson v. Spencer, 18 B. Monr., 450; Van Epps v. Van Epps., 9 Paige, 237; Hawley v. Cramer, 4 Cowen, 717.

³ Follansbee v. Kilbreth, 17 Ill., 522; Jones v. Smith, 3 Miss., 215; Powell v. Murry, 2 Edw., 636, affirmed 10 Paige, 256; Bergen v. Bennett, 1 Caine's Cas., 1; see also, as to trustees by implication, etc., Deconche v. Savetier, 3 Johns. Ch., 190; Shaver v. Radley, 4 Johns. Ch., 310; Jackson v. Walsh, 14 Johns., 407; Jackson v. Van Dalfsen, 5 Johns., 43; Bostwick v. Atkins, 3 Coms., 53; Bron v. Chiles, 10 Pet., 177.

⁴ McNish v. Pope, 8 Rich. Eq., 112; Female Association of New York v. Beekman, 21 Barb., 565.

⁵ Iddings v. Bruen, 4 Sand. Ch., 223.

CHAPTER V.

OF THE DUTIES AND LIABILITIES OF TRUSTEES.

SECTION 1. OF THE GENERAL DUTIES AND
LIABILITIES OF TRUSTEES.

Where there are several trustees appointed for the management of the trust, their relation to each other in general, is that of joint tenants. Whatever may be the terms of the gift, if possible, the court will affix to it this construction, because it is more convenient so to consider it.¹ Hence the law of survivorship, that upon the death of one of several trustees, the estate devolves upon the survivor or survivors; and upon the death of the last surviving trustee, where there are no special provisions in the instrument creating the trust for the appointment of others, or by statute otherwise providing, the estate devolves according to its legal quality, either upon the heir-at-law or personal representative.²

How far the heir-at-law or personal representa-

¹ Hill on Trustees, 303; see statutes of New York, Michigan, Indiana, Illinois, Missouri, Arkansas, etc., in which the estate of trustees is declared to be that of joint tenancy.

² Shook v. Shook, 19 Barb., 653; De Peyster v. Ferrers, 11 Paige, 13; Shortz v. Unangst, 3 W. & S., 45; Richardson v. Ryan, 15 Ill. R., 13; see Cruise Dig., tit. 18, ch. 1, (n).

tives are competent, or bound to administer the trusts, depends upon circumstances. Where the powers of the original trustees are general, and are not given to them personally in special confidence, the heir or personal representative has the same power to act as the original trustee.¹ But where the powers are to be exercised according to the personal discretion of the original trustee, the heirs or personal representatives will not be competent unless specially authorized by the trust instrument.² But of this hereafter. In case of the death of a mere dry trustee, and where no provision is made in the trust instrument for the continuance of the office in another, the estate, if there be no surviving trustee, will be cast upon the heir-at-law or personal representative, as a mere act of law; and in such cases, the heir or personal representative will not be competent to make a valid disclaimer; because the original trustee having in his lifetime accepted the trust, and having made no other disposition of the estate, it must go, as in any other case, where the law casts it.³ It has been a grave question, whether an heir, whose ancestor in his lifetime has not expressly accepted the trust, or in any manner performed acts in respect thereto, which would fix him with the trust, can make a valid disclaimer. There seems to be no decisions authorizing such disclaimer.

¹ Hill on Trustees, 175 and 222; Lewin on the Law of Trusts, 232; Creagh v. Blood, 3 Jones & Lat., 170.

² Lewin on Trusts, 290; Turner v. Corney, 5 Beav., 517; Ghost v. Waller, 9 Beav., 497; Chambers v. Minchin, 7 Ves., 196; Niles v. Stevens, 4 Denio, 399; see Andrew v. N. Y. B. So., 4 Sand., 156.

³ King v. Phillip, 16 Jur., 1080; Goodson v. Ellison, 3 Russ., 583.

Mr. Hill¹ thinks, "upon principle, that a disclaimer by the heir or personal representative of a donee in trust, may well be supported, where the original donee has done no act in his lifetime to testify his acceptance of the trust. He remarks, that wherever such a question could arise, it would almost invariably be found that the trust estate is expressly *limited to the heir or representative* of the original nominee: and where the persons to take the estate by representation to the original trustees are so designated, there does not seem to be any valid reason why they should not also take the power to repudiate the gift, equally with the original trustee, provided that power had not been defeated by any previous act of the latter." Mr. Hill does not distinguish between the *act of the party* and the *mere operation of law*. If the heir or personal representative is to take the estate *because* he has been designated by the term *heir, executor or administrator*, that is, if he is to take by *purchase*, then there is no valid reason why he should not take the power to repudiate the gift. But if he is to take as the *mere legal representative of the original donee*, whether as *heir or personal representative*, then there may be a question whether he can disclaim. But Mr. Hill continues, "Even where there are no such words of limitation of the trust estate, the estate of the heir or personal representative is merely a continuation of the previous estate; and as a part of that estate consisted of the power or right to call the office of

¹ Hill on Trustees, 222.

trustee into existence by an act of acceptance, or to repudiate it by a proper act of dissent, the continuation of the estate in the heir or personal representative would not be perfect if it came to them shorn of that power or right. The argument derived from the absurdity and injustice of forcing a person to accept an estate against his will, applies with equal force to an heir or personal representative, as to the original donee."

The argument of Mr. Hill looks to imposing upon the heir or personal representative an estate by the act of the parties, that is by purchase, and casting upon him, without his consent, the duties of an active trust. While a person is not bound to accept a gift in trust or otherwise, yet he cannot avoid the receiving of an estate where it devolves upon him by mere operation of law. While it is true that a person cannot be compelled to take an estate even by gift, without his assent either expressed or implied,¹ it is also true that while he stands in the legal relation of heir, he cannot avoid the legal consequences of that relation. Therefore, Mr. Hill's argument is not quite conclusive on that subject. It is conceded that where the original trustee has accepted the trust in his lifetime, it is no longer competent for the heir or personal representative to disclaim;² that is, where the legal estate is in the ancestor, it will devolve upon the heir, in the absence of any other disposition of it. In the

¹ Shep. Touchst., 285; *Thompson v. Leech*, 2 Ventr., 198; *Hawkins v. Kemp*, 3 East, 410.

² Hill on Trustees, 303, 222; Lewin on Trusts, 232.

absence of any disclaimer by the ancestor, his acceptance of the trust would seem to be presumed under certain circumstances. It is the duty of the trustee, if he intend to decline the administration of the trust, to disclaim without delay. And where the question is one affecting the interest of third parties, the court might be more strict in holding the trustee to proof of his non-acceptance of the trust. There is no specified time within which a trustee is bound to disclaim or be deemed to have accepted the duties of the office. It must depend upon circumstances. It may be exercised after a period of sixteen years, provided the interval can be explained so as to rebut the presumption of his having accepted the trust;¹ or he may be presumed to have accepted the trust after a period of four years.² In the case of *Wise v. Wise*,² Lord St. Leonard remarked, "that where an estate was vested in trustees who knew of their appointment, and did not object at the time, they would not be allowed afterwards to say they did not assent to the conveyance; and it would require some strong act to induce the court to hold in such a case that the estate was divested."² Where the trustee has lain by for a long time without disclaiming, it may become a question for the jury to say, whether his lying by was because of his having accepted or disclaimed the trust.³

¹ *Doe v. Harris*, 16 M. & W., 517; *Noble v. Meymott*, 14 Beav., 471.

² *Wise v. Wise*, 2 Jones & Lat., 34.

³ *Doe v. Harris*, 16 M. & W., 522; see also *Re Needham*, 1 Jones & Lat., 34; *Re Uniacke*, 1 Jones & Lat., 1.

In settling the question, then, whether the trust estate devolves upon the heir or personal representative, and whether the right of disclaimer is in the heir under any given state of facts, it is submitted that if the legal estate is in the ancestor, and not otherwise disposed of, it must descend to the heir or personal representative, by the mere operation of law, and vest in him or them the legal estate with all its incidents. But if the circumstances are such that the court would deem the ancestor not to have accepted the trust, were the question between the ancestor and other parties, then the estate, not being in the ancestor, will not devolve upon the heir.

But it is a principle well established, that the ancestor cannot charge the heirs or personal representatives with his debts or other liabilities beyond the estates or assets in their hands; that is, he can only charge the estates they take from him. Neither can the settlor impose upon the trustee duties he is unwilling to assume. And upon the same principle, although the legal estate of the trust property may devolve upon the heir or personal representative, yet it will not impose upon him any duties to be performed at his own expense. Therefore, where the trust estate thus devolves upon the heir or personal representative, he may unquestionably apply to the court to be discharged and have other trustees appointed in his place, without rendering himself liable for costs.¹

¹ Hill on Trustees, 303.

But in all cases where the estate descends to the heir or personal representatives, they will be excluded from exercising those powers which were discretionary in the original trustee alone, or which pertained to a personal confidence reposed in him.¹

Such being the character and nature of the estate in the trustee, it follows that all co-trustees must have equal authority, power and interest in respect to the trust estate. Therefore, it is a general rule, that they must all join in the act which is to affect the interest of the trust estate. Thus, they must all join in making sales or leases of trust property, as well as in signing receipts, giving discharges, &c.² Consequently, in every ministerial act requisite for the proper discharge of the trust, the trustees are bound to concur. And should any one, without good and sufficient reason, refuse to assent to the necessary acts of his co-trustees, he would be compelled to do so by decree of court, and would be visited with costs if his concurrence was wrongfully withheld.³

The rules by which to determine when all are bound by the acts of each trustee are few and simple. Where the acts performed by one trustee are

¹ See *Andrew v. N. Y. Bib. So.*, 4 Sand., 156; but see *Leggett v. Hunter*, 19 N. Y. Rep., 445.

² *Fellows v. Mitchel*, 1 P. Wms., 83; *Leigh v. Barry*, 3 Atk., 584; *Chambers v. Minchin*, 7 Ves., 198; *Sinclair v. Jackson*, 8 Cowen, 544; *Vander's Appeal*, 8 W. & S., 405; *Ridgley v. Johnson*, 11 Barb. S. C., 527; *Att'y Gen. v. Cumming*, 2 N. C. C., 139; see also *Matter of Wadsworth*, 2 Barb. Ch. Rep., 381.

³ *Reade v. Sparks*, 1 Moll., 8; *Guyton v. Shane*, 7 Dana, 498; *Gaunt v. Falkner*, 2 Beav., 347; *Nicholson v. Faulkner*, 1 Moll., 559; *Davis v. McNeil*, 1 Ired. Eq., 344; *Doyle v. Sherratt*, 2 Eq. Ca. Abr., 742, note.

for the benefit of all *necessarily*, all will be bound by the act. Such is the rule of law applicable to all joint tenants,¹ So, also, where the act of one is for the benefit of the estate, the act is binding upon all; because, what is for the benefit of their estate, must be for their benefit, at least by legal intendment. Upon the like principle, the possession or seisin of one of several joint tenants is the possession of all; and the statute of limitations will not commence to run against the *cestui que trust*, so long as one trustee is in possession.² So, likewise, one of several joint tenants has power to receive and give discharges for rents, incomes and dues of the estate.³

But where the act of one is not necessarily for the benefit of the whole or for the benefit of the estate, but, on the contrary, might tend to their prejudice, they are not bound.⁴ These rules are applicable only in the absence of provisions to the contrary. Where, by the provisions of the trust instrument, a power merely collateral or discretionary is given to several individuals by name, and to them only, such power can be executed only by all those named. For, in such case, the power is

¹ *Rudd v. Tucker*, Cro. Eliz., 803; 2 Cruise's Dig., tit. 18, ch. 1; see 60; 6 Mod., 44; 1 Inst., 49, *b*, also 192, *a*.

² *Att'y Gen. v. Flint*, 4 Hare, 147.

³ *Husband v. Davis*, 10 C. B., 645; *Williams v. Nixon*, 2 Beav., 472; *Townley v. Sherborne*, Bridg., 35; but see *Walker v. Symonds*, 3 Sw., 1, 58; *Clough v. Bond*, 3 M. & Cr., 490; *Webb v. Ledsman*, 19 Jur., 775, or 1 Kay & John., 335; *Riddle v. Mandaville*, 5 Cranch, 329.

⁴ *Rudd v. Tucker*, Cro. Eliz., 803; *ex parte Rigby*, 19 Ves., 463; *Right d. Fisher v. Cuthell*, 5 East, 491; *Chitty on Contracts*, 640; *Gulledge v. Barry*, 31 Miss., (2 George,) 346; *Weston v. Murnan*, 4 Ind., 271.

strictly personal, and does not attach to the office.¹ So, also, in all ministerial acts requisite for the discharge of the trust all must concur.²

Where a trustee named has never accepted the trust, but has disclaimed, the estate, powers, etc., are vested in those who do accept; and, consequently, such disclaiming trustee need not join in any sale or other disposition of the estate, or in the receipt for trust moneys, or in any of the ministerial acts of the trustees. The same, also, where one, having accepted, has been duly discharged.³

One trustee may be constituted the agent of the others, in transacting much of the business pertaining to the office of trustee; and, within the scope of such agency, his acts will be binding upon all. But, in such case, his acts are to be considered as the acts of an agent, rather than those of an individual trustee.⁴

So, also, where the trust instrument expressly authorizes a majority of the trustees, or any definite number of them, to administer the trust, and they attempt to do so in good faith, the minority must concur in the acts of the majority.⁵ So, also, in.

¹ 1 Sug. Pow., 138; Hill on Trustees, 307.

² See cases, ante, Acceptance of the Trust by Trustee; see Hill on Trustees, 307, 545, 551.

³ See *Hawkins v. Kemp*, 3 East, 410; *Smith v. Wheeler*, 1 Vent., 128; *Adams v. Taunton*, 5 Madd., 435; *Worthington v. Evans*, 1 S. & St., 165; *Lord Braybrook v. Inskip*, 8 Ves., 417; see also *Crewe v. Dicken*, 4 Ves., 97.

⁴ See *ex parte Rigby*, 19 Ves., 463; *Goodtitle d. King v. Woodward*, 3 B. & Ald., 689; *Sinclair v. Jackson*, 8 Cow., 543; *Bowers v. Seeger*, 8 W. & S., 222; see *Abbot v. American Hard Rubber Co.*, 33 Barb. S. C., 579.

⁵ *Att'y Gen. v. Cumming*, 2 N. C. C., 139.

cases of charitable and public trusts, they are usually administered by a majority of the trustees; but their acts are the acts of the whole.¹

The trust estate being vested in all the trustees equally, as joint tenants, each and all have equal power and authority in its management, and must all act in the execution of the trust. Thus, they must all join in receipts and conveyances; and a deed executed by two trustees, without evidence of the death of the third would not be valid.²

As a consequence of this power and authority which is vested in each and all, holding the office of trustee, they have each and all duties to perform in respect to the trust estate, and for the faithful performance of which, on their part, they are answerable. And among the first duties of each trustee is that of protecting the estate from the wrongful acts or omissions of his colleagues.³ Each trustee has the right of calling his co-trustee to an account whenever he has reason to believe he has committed or is committing a breach of trust. If, therefore, through neglect of this duty to protect the trust, one trustee permits another associated with him in that office to misappropriate or otherwise waste or lose the trust estate, he is personally

¹ *Att'y Gen. v. Shearman*, 5 Beav., 104; *Wilson v. Dennison*, Ambl., 82; *Att'y Gen. v. Scott*, 1 Ves., 431; *Wilkinson v. Malin*, 2 Tyr., 544.

² *Ridgley v. Johnson*, 11 Barb., 527; see also *M. E. Ch. of P. v. Stewart*, 27 Barb., 553; see also *Wood v. Wood*, 5 Paige, 596; but see *Burrill v. Sheil*, 2 Barb., 457.

³ *Story's Eq. Jur.*, sec. 1275; *Oliver v. Court*, 8 Price Rep., 127; *Hill on Trustees*, 308.

answerable to the *cestui que trust* for the amount of such loss.¹

As a general rule, trustees are not liable for the acts of each other, unless they have made some agreement by which they have expressly agreed to be bound for each other, or have, by their own voluntary connivance or co-operation, enabled one or more to accomplish some known object in violation of the trust.² In the case of *Townley v. Sherbourne*,³ Lord Keeper Coventry, under the advice of the associate judges, after deciding that a trustee was not liable for rents which had properly come into the hands of a co-trustee, and had not been paid over, said: "But if, upon proofs or circumstances, the court should be satisfied that there had been any *dolus malus*, or any evil practice, fraud, or ill-intent in him that permitted his companion to receive the whole profits, he should be charged though he received nothing."³

Mr. Story, in his *Equity Jurisprudence*, after briefly detailing the duties of the trustee in respect to the trust estate and the rights and interests of the *cestui que trust*, proceeds to remark: "Finally, he is to act in relation to the trust property with reasonable diligence; and, in cases of a joint trust,

¹ Hill on Trustees, 308; *Townley v. Sherbourne*, Bridg., 35; *Brice v. Stokes*, 11 Ves., 319; *Story's Eq. Jur.*, sec. 1275; *Mumford v. Murray*, 6 Johns. Ch., 1, 452; *Bowman v. Raineteaux*, Hoff., 150.

² *Story's Eq. Jur.*, sec. 1275, 1280; *Taylor v. Roberts*, 3 Alab., 86; *State v. Guilford*, 15 Ohio, 509; *Latrobe v. Tiernan*, 2 Md. Ch., 480; *Osgood v. Franklin*, 2 J. Ch. R., 1; *Leigh v. Barry*, 3 Atk., 583; *Kerr v. Waters*, 19 Geo., 136.

³ *Townley v. Sherbourne*, Bridg., 35; see *Brice v. Stokes*, 11 Ves., 319.

he must exercise due caution and vigilance in respect to the approval of, or acquiescence in, the acts of his co-trustees; for, if he should deliver over the whole management to others, and betray supine indifference or gross negligence in regard to the interests of the *cestui que trust*, he will be held responsible;"¹ and he adds, "these remarks apply to the ordinary case of a trustee having a general discretion, and exercising his powers without any special directions. But where special directions are given in the instrument creating the trust, or special duties are imposed upon the trustee, he must follow out the objects and intentions of the parties faithfully, and be vigilant in the discharge of his duties. There are, necessarily, many incidental duties and authorities belonging to almost every trust, which are not expressed. But these are to be as steadily acted upon and executed, as if they were expressed."²

Wherever the trustee has a duty to perform in respect to the trust property, if he be guilty of gross neglect of that duty, he will be deemed guilty of a breach of trust, and held answerable for the consequences. No one is compelled to accept the office of trustee, and take upon himself the burdens thereof; but if he do accept it, it is but just that he should be held to a faithful discharge of its du-

¹ Story's Eq. Jur., sec. 1275; *Oliver v. Court*, 8 Price Rep., 127; see *Thompson v. Finch*, 39 Eng. L. and Eq., 97; *McMurry v. Montgomery*, 2 Swan, (Tenn.,) 374.

² Story's Eq. Jur., sec. 1276; see Mitf. Eq. Pl., by Jeremy, 133, 134; *Leech v. Leech*, 1 Ch. Ca., 249; see *Ellig v. Naglee*, 9 Cal., 683; *Landis v. Scott*, 32 Penn. St. Rep., 495.

ties.¹ While it is true, therefore, that, as a general rule, trustees are not liable for the acts of each other, yet if they deliver over the whole management to a co-trustee, and manifest a supine indifference or gross negligence in regard to the interest of the *cestui que trust*, they will be held answerable. Thus, where two trustees, with power of sale, had conveyed the estate to the purchaser, and had both signed the receipt for the money, yet one of them only had received it, and ten years after died insolvent, without having accounted for the money, and it was proved that his co-trustee was cognizant of the misemployment of the fund, but took no active measures to recover it out of his hands, the court held he had been guilty of a breach of trust, and was answerable, remarking "that, as soon as a trustee is fixed with a knowledge that his co-trustee is misapplying the money, a duty is imposed upon him to bring it back into the joint custody of those who ought to take better care of it,"² for a trustee is bound to manage and employ the trust property for the benefit of the *cestui que trust*, with the care and diligence of a provident owner.³

¹ *Cooper v. McClun*, 16 Ill., 435.

² *Brice v. Stokes*, 11 Ves., 319; *Williams v. Nixon*, 2 Beav., 475; *Booth v. Booth*, 1 Beav., 125; see also *Bone v. Cook*, McClel., 168; *Gregory v. Gregory*, 2 Y. & C., 313; *Lincoln v. Wright*, 4 Beav., 427; see also *Jones' Appeal*, 8 W. & S., 147; *Evans' Estate*, 2 Ashm., 470; *Ringgold v. Ringgold*, 1 H. & G., 11; *State v. Guilford*, 15 Ohio, 593; *Deaderick v. Cantrell*, 10 Yerg., 264; *Wayman v. Jones*, 4 Md. Ch., 506; see also *Burrows v. Walls*, 35 Eng. Law and Eq., 139.

³ *Hutchinson v. Lord*, 1 Wis., 286; *Higgins v. Whitson*, 20 Barb., 141; see also *Wiles v. Gresham*, 31 Eng. L. and Eq., 237; *Bate v. Hooper*, 35 Eng. L. and Eq., 160; *Burrows v. Walls*, 35 Eng. L. and Eq., 139; *Brown v. Campbell*, Hop., 233; *Litchfield v. White*, 3 Sand., 545; see also *Pierson v. Thompson*, 1 Edw., 212.

It sometimes happens that it is necessary and proper, for the due discharge of the trust, that the trust property should be committed exclusively to the charge of one or more of the co-trustees, and when this is the case, the other trustees will not be liable for the subsequent acts of those to whom it has been so committed. Said Lord Cottenham,¹ “when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been entrusted, necessity, *which includes the regular course of business in administering the property*, will, in equity, exonerate the personal representatives. But if, without such necessity, he be instrumental in giving to the person failing, possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator.” Upon this latter principle, where a trustee joins in any act, or in carrying into effect any arrangement, by which the trust property is taken from the *joint control* of the trustees, and is placed at the sole disposal or under the management of one or more of their number, by which it is lost, the trustee or trustees so acting, without a reasonable necessity for so doing, will be liable for the consequences; for by so acting, the security of the trust property is diminished, and thus, he or they become directly accessory to its loss.²

¹ *Clough v. Bond*, 3 M. & Cr., 490; *Att’y Gen. v. Randall*, 2 Eq. Ca. Abr., 742; *ex parte Griffin*, 2 Gl. & J., 114; *Williams v. Nixon*, 2 Beav., 472; *Terrell v. Matthews*, 11 Law Jour., N. S., Chancery, 31.

² See *Sadler v. Hobbs*, 2 Bro. C. C., 114; *Scurfield v. Hawes*, 3 Bro. C. C., 90; *Chambers v. Minchen*, 7 Ves., 198; *Shipbrook v. Hinchbrook*, 11 Ves., 252; *Brice v. Stokes*, 11 Ves., 319; *Hanbury v. Kirkland*, 3 Sim.,

There can be no question of the propriety and justice of this rule in all cases where there was not a *reasonable necessity* for placing the management of the property or funds under the control of such trustee or trustees. But where a trustee has acted in good faith, and in the exercise of a fair discretion, and in the same manner as he would ordinarily do in the management of his own property, there being a *reasonable necessity* for so doing, he ought not to be held responsible.¹ As to what constitutes a *reasonable necessity*, there may, at times, be some difficulty in determining. But as a general rule, it will be found to be such a *necessity* as would induce men of prudence and discretion in the transaction of their own business, to pursue the same or a similar course under the like circumstances.²

It has already been seen that it is a prime duty of the trustee to protect the trust estate from any misfeasance by his co-trustee; therefore, when any such intended purpose comes to his knowledge, he should seek promptly to prevent it, by injunction, if necessary, and where the act has already been

265; *Keble v. Thompson*, 3 Bro. C. C., 111; *French v. Hobson*, 9 Ves., 103; *Joy v. Campbell*, 1 Sch. & Lef., 341; *Moses v. Levi*, 3 Y. & Col., 359; *Clough v. Bond*, 3 M. & Cr., 497; or join in signing a draft or order, see *Saddler v. Hobbs*, 2 B. C. C., 114; *Broadhurst v. Balguy*, 1 N. C. C., 16; or execute a joint power of attorney, *Harrison v. Graham*, 1 P. Wms., 241, *n*; *Hewett v. Foster*, 6 Beav., 259; *Mumford v. Murray*, 6 John. Ch., 452; *Bowman v. Raineteaux*, Hoff., 150; see stock disposed of under a joint power, *Spencer v. Spencer*, 11 Paige, 299; *Monell v. Monell*, 5 Johns. Ch., 283; *Mesick v. Mesick*, 7 Barb., 120.

¹ *Story's Eq. Jur.*, sec. 1272; *Hart v. Ten Eyck*, 2 Johns. Ch. Rep., 76; *Thompson v. Brown*, 4 Johns. Ch. Rep., 619.

² *Clough v. Bond*, 3 M. & Cr., 490; *Att'y Gen. v. Randall*, 2 Eq. Ca. Abr., 742; *ex parte Griffin*, 2 Gl. & J., 114.

committed, he should take the necessary measures to compel the restitution of the property, and the application of it to the purposes and objects of the trust: and a failure to do this will make him liable for a breach of his duty.¹

If, therefore, a trustee permits the trust funds or property to remain for a long time in the hands of a co-trustee, uninvested, or not properly secured, he is guilty of that negligence which will make him liable in case of loss: for it is a duty he owes to those interested, to see that the trust funds are properly invested and secured.² The fact that all the trustees have joined in the receipt for money will not of itself make them all liable where the money was received by only one of their number; and those who have not received will be at liberty to show that the money for which their receipt was given, was never in their hands or directly under their control.³ This is permitted, because, in transactions with trustees, it is essential for the security of those dealing with them that all should sign the receipts; and therefore it was well said, "that it

¹ *In re* Chertsey Market, 6 Price, 279; *Powlett v. Herbert*, 1 Ves., Jr., 297; *Walker v. Symonds*, 3 Sw., 71; *Hanbury v. Kirkland*, 3 Sim., 265; *Mumford v. Murray*, 6 J. C. Rep., 1; *Ringgold v. Ringgold*, 1 H. & G., 11; *Bowman v. Raineteaux*, Hoff., 150.

² *Brice v. Stokes*, 11 Ves., 319; *Weigand's Appeal*, 28 Penn. St. Rep., 421; *Challan v. Sheppan*, 4 Hare, 452; *Pim v. Downing*, 11 S. & R., 71; *Gregory v. Gregory*, 2 Y. & C., 313; *Scurfield v. Hawes*, 3 Bro. C. C., 91; *Hanbury v. Kirkland*, 3 Sim., 265; but see *White v. Bullock*, 20 Barb., 91.

³ *Townley v. Sherbourne*, Bridg., 35; *Brice v. Stokes*, 11 Ves., 324; *ex parte* Belchier, Amb., 219; *Chambers v. Minchin*, 7 Ves., 198; *Webb v. Ledsam*, 1 Kay & John., 388; *Jones' Appeal*, 8 W. & S., 147; *Monell v. Monell*, 5 J. Ch. R., 283; *Deaderick v. Cantrell*, 10 Yerg., 264; *Kip v. Deniston*, 4 John. Rep., 23; *Manahan v. Gibbons*, 19 Johns., 427.

would be tyranny to punish a trustee for an act which the very nature of his office would not permit him to decline.”¹

In this respect a distinction has been taken between trustees and executors, whose concurrence in acts relating to the estate are not necessary. It has been held that, if an executor joins with his co-executor in a receipt, he does an unnecessary act; and interferes where the nature of his office does not require it of him, and therefore he shall be answerable.² But it is extremely doubtful whether the distinction between trustees and executors, in this respect, is as great as the above cited cases would indicate. The reason assigned for the distinction would not seem to demand that a co-executor should be liable in equity for merely signing his name unnecessarily to a receipt, where it was not intended to make him responsible, and no one had been misled or injured thereby. Accordingly, Lord Northington, in the case of *Westley v. Clark*,³ qualified

¹ Lewin on Trusts, 305.

² *Aplyn v. Brewer*, Pr. Ch., 173; *ex parte Belchier*, Amb., 219; *Leigh v. Barry*, 3 Atk., 584; *Darwell v. Darwell*, 2 Eq. Ca. Abr., 456; *Gregory v. Gregory*, 2 Y. & C., 316; *Johnson v. Johnson*, 2 Hill's Eq., 290; *Monell v. Monell*, 5 J. Ch. R., 288; *Manahan v. Gibbons*, 19 John., 427; *Jones' Appeal*, 8 W. & S., 147; *Clark v. Jenkins*, 3 Rich. Eq., 318; *Ducommun's Appeal*, 17 Penn. St. Rep., 270.

³ *Westley v. Clark*, 1 Ed., 357. In this case, Thompson, one of three co-executors, had called in a sum of money secured by mortgage for a term of years, and received the amount, and afterwards, in the same day, sent round his clerk to his co-executors with a particular request that they would execute the assignment and sign the receipt, which they did. Thompson afterwards became bankrupt and the money was lost, and thereupon a bill was filed to charge the co-executors. See likewise *Scurfield v. Howes*, 3 Bro. C. C., 94; *Hovey v. Blakeman*, 4 Ves., 608; *Walker v. Symonds*, 3

the application of that rule. He held that the rule that executors joining in a receipt were all liable, amounted to no more than this, "that a joint receipt given by executors is a *stronger* proof that they *actually joined in receiving the money* because, generally, they had no occasion to join for conformity. But, if it appear plainly that one executor only received and discharged, etc., and the others joined afterwards, without any reason, and without being in the capacity to control the act of their co-executor, either before or after that act was done, what ground has any court in conscience to charge him? Equity arises out of a *modification of acts*, where a very minute circumstance may make a case *equitable* or *iniquitous*; and, though former authorities may and ought to bind the determination of subsequent cases with respect to rights, as in the *right of dower*, or *curtesy*, yet there can be no rule for the future determination of this court concerning the acts of men." His Lordship held in that case, that the only act which affected the assets of the estate was done by the acting executor who discharged the debt, and that the subsequent act of his co-executors was merely nugatory; and, therefore, for that act, they were not liable. In respect to this distinction between co-trustees and co-executors, Mr. Story remarks:¹ "The propriety

Sw., 64; Churchhill v. Lady Hobson, 1 P. Wms., 241; Joy v. Campbell, 1 Sch. & Lef., 341; Story's Eq. Jur., sec. 1281; Stell's Appeal, 10 Barr, 152; Ochiltree v. Wright, 1 Dev. & Batt. Eq., 336; McNair's Appeal, 4 Rawle. 155.

¹ See Story's Eq. Jur., sec. 1281, and note (3), 7th ed.; see also Hill on Trustees, 450, note (1), 3d Am. ed., by Wharton.

of the doctrine which, in favor of trustees, makes them liable only for their own acts and receipts, has never been questioned, and, indeed, stands upon the principle of general justice. There is a good deal more question as to the distinction which is made unfavorably to executors. In truth, upon general reasoning, it seems difficult to maintain its sound policy, or practical convenience, or intrinsic equity. It has, on this account, sometimes been struggled against. But it is finally established, as a general rule, in the Equity Jurisprudence of England, although, perhaps, not universally in that of America.”¹ A careful examination of the modern adjudications of this rule against executors, plainly demonstrates that a sense of intrinsic justice is protesting against sacrificing the rights of the executor to a rule of doubtful policy. The most that has been said in favor of the rule, was said by Lord Eldon in the case of *Chambers v. Minchin*:² “A plain general rule, which once laid down was easily understood and might be generally known, was much more inviting to executors than a rule referring everything to the particular circumstances.” But, a rule like that, based upon a single fact of such doubtful significance as the mere joining in a receipt by a co-executor, if strictly adhered to, can not fail to work injustice.³

¹ See preceding note.

² *Chambers v. Minchin*, 7 Ves., 197.

³ See the reasoning of Chancellor Kent in *Monell v. Monell*, 5 Johns. Ch. Rep., 283; *Manahan v. Gibbons*, 19 Johns. Rep., 427; *Sutherland v. Brush*, 7 Johns. Ch. Rep., 22; see Lord Alvanly, in *Scurfield v. Howes*, 3 Bro. C.

Mr. Story,¹ with his usual clear perception of the right, and comprehensive expression of the same, remarks: "Perhaps, the truest exposition of the principle which ought, in justice, to regulate every case of this sort, whether it be the case of executors, guardians, or of trustees, is that which has been adopted by a learned equity judge of our own country. It is, that if two executors, guardians, or trustees, join in a receipt for trust money, it is, *prima facie*, although not absolutely conclusive, evidence that the trust money came to the hands of both. But either may show, by satisfactory proof, that his joining in the receipt was necessary, or merely formal, and that the money was, in fact, all received by his companion. And, without such satisfactory proof, he ought to be held jointly liable to account to the *cestui que trust* for the money, upon a fair implication resulting from his acts, that he did not intend to exclude a joint responsibility."¹

"But, wherever either a trustee or an executor, by his own negligence or laches, suffers his co-trustee or co-executor to receive and waste the trust fund or assets of the testator, when he has the means of preventing such receipt and waste, by the exercise of reasonable care and diligence, then, and

C., 94; also in *Hovey v. Blakeman*, 4 Ves., 608; Lord Northington. in *Westley v. Clark*, 1 Eden, 357; Lord Harcourt, in *Churchill v. Lady Hobson*, 1 Pr. Wms., 241.

¹ See Story's Eq. Jur., sec. 1283, and he cites *Monell v. Monell*, 5 John. Ch. R., 296; see also *Hovey v. Blakeman*, 4 Ves., 596; *Crosse v. Smith*, 7 East Rep., 244; *Scurfield v. Howes*, 3 Bro. C. C., 93; *Westley v. Clark*, 1 Eden Rep., 357; *Joy v. Campbell*, 1 Sch. & Lef., 341; *Sutherland v. Brush*, 7 Johns. Ch. Rep., 22; *Monell v. Monell*, 5 Johns. Ch. Rep., 283; *White v. Bullock*, 20 Barb., 91; see *Mesick v. Mesick*, 7 Barb., 120.

in such case, such trustee or executor will be held personally responsible for the loss occasioned by such receipt and waste of his co-trustee or co-executor."¹ "Or if by any positive act, direction or agreement of one joint executor, guardian or trustee, the trust money is paid over and comes into the hands of the other when it might and should have been otherwise controlled or secured by both, then each of them will be held chargeable for the whole."² And if one trustee should wrongfully suffer the other to detain the trust money a long time in his own hands, without security, or should lend it to the other on his simple note, or should join with the other in lending it to a tradesman upon insufficient security, he will be deemed liable for any loss.³

¹ *Clark v. Clark*, 8 Paige, 152; *Edmonds v. Cronshaw*, 14 Peters, 166; *Williams v. Nixon*, 2 Beav., 472; *Story's Eq. Jur.*, sec. 1283; *Brice v. Stokes*, 11 Ves., 319; *Walker v. Symonds*, 3 Sw., 41; *Oliver v. Court*, 8 Price, 166; *in re Chestersy Market*, 6 Price, 279; *Styles v. Guy*, 1 Mac. & Gor. 422; and see *Scully v. Delany*, 2 Ire. Eq. Rep., 165; see also *Thompson v. Finch*, 39 Eng. L. and Eq. Rep., 97; *McMurray v. Montgomery*, 2 Swan, (Tenn.), 374.

² *Story's Eq. Jur.*, sec. 1284; *Gill v. Att'y Gen.*, Hard. R., 314; *Lord Shipbrook v. Lord Hinchinbrook*, 16 Ves., 479; *Sadler v. Hobbs*, 2 Bro. C. C., 116; *Monell v. Monell*, 5 Johns. Ch. R., 294; *Townsend v. Barber*, 1 Dick, 356; *Moses v. Levi*, 3 Y. & C., 359; *Hovey v. Blakeman*, 4 Ves., 608; *Clough v. Dixon*, 8 Sim., 594, and 3 M. and Cr., 490; *White v. Bullock*, 20 Barb., 91.

³ *Sadler v. Hobbs*, 2 Bro. C. C., 114; *Keble v. Thompson*, 3 Bro. C. C., 112; *Brice v. Stokes*, 11 Ves., 319; *Mumford v. Murray*, 6 John. Ch. R., 1, 16; *Williams v. Nixon*, 2 Beav., 475; see also *Pim v. Downing*, 11 S. & R., 71; also *Estate of Evans*, 2 Ashm. 470; *Bowman v. Raineteaux*, Hoff., 150; *Spencer v. Spencer*, 11 Paige, 299; *Mesick v. Mesick*, 7 Barb., 120; see *White v. Bullock*, 20 Barb., 91. Where administrators give a joint bond, each is liable for the other, etc., unless the bond show a contrary intent. See *Pearson v. Darrington*, 32 Alab., 227.

It is usual to insert in instruments creating the trust, a clause declaring that one trustee shall not be answerable for the receipts, acts or defaults of his co-trustee. But this proviso, while it may tend to mislead the trustee as to the extent of his liability, adds nothing to his security against the liabilities of the office. Equity infuses such a proviso into every trust deed; and a party can have no better right from the expression of that, which, if not expressed, equity necessarily implies.¹

As the liability of the trustee is determined by first determining his duty, his general and particular liabilities must depend upon his general and particular duties. One of the first duties of the trustee is to place the trust property in a state of security. If it consist in a mere equitable interest in a legal estate, which cannot be transferred to him immediately, he should give notice without delay, to the one in whom the legal estate is vested.²

If the trust fund consists of a *chose in action*, which may be reduced to possession, and thus be placed under his own control, any unnecessary delay in getting it into possession, by means of which it is lost, will render him liable. The doctrine is, if a person accept the trust he must perform it; he must use due diligence and not permit the interests of the *beneficiary* to suffer through negligence. If there be a *crassa negligentia*, and a loss sustained by

¹ See *Westley v. Clark*, 1 Eden, 360; *Dawson v. Clark*, 18 Ves., 254; *Worrall v. Harford*, 8 Ves., 8; see also *Brice v. Stokes*, 11 Ves., 319; *Williams v. Dixon*, 2 Beav., 472.

² *Jacobs v. Lucas*, 1 Beav., 436.

the estate, it shall fall upon the executor, etc.¹ Accordingly, a trustee or an executor must not allow the assets of his testator to be outstanding upon mere *personal* security; but if necessary he must institute legal proceedings for their recovery; and it will make no difference, though the testator himself created the debt by a loan on what he considered an eligible investment.² But upon a question of imputed negligence in not collecting a note, the trustee may show that before the plaintiff acquired an interest, the others beneficially interested, directed him to pursue the course of delay which was attributed as negligence.³ It has already been observed that the trustee in the management of the trust estate is required to act with the prudence and discretion of a discreet man in the management of his own affairs: that is, he must exercise the same care and solicitude for the interest of his *cestui que trust* he would for his own interests. This is all a Court of Equity will exact of him.⁴

¹ Caffry v. Darby, 6 Ves., 488; McGachen v. Dew, 15 Beav., 84; Warring v. Warring, Ir. Ch. Rep., 335; Wiles v. Gersham, 2 Drew, 258; Tebbs v. Carpenter, 1 Mad., 290; Shultz v. Pulver, 3 Paige, 182, aff'd 11 Wend., 361; see also Litchfield v. White, 3 Sand., 545; Weigand's Appeal, 28 Penn. St. Rep., 471; Tuttle v. Robinson, 33 N. H., 104; Wiles v. Gersham, 31 Eng. L. and Eq., 237; Cartwright v. Cartwright, 4 Hay, 134.

² Powell v. Evan, 5 Ves., 839; Bullock v. Wheatly, 1 Coll., 130; Lowson v. Copeland, 2 Bro. C. C., 156; Tebbs v. Carpenter, 1 Mad., 298; Clough v. Bond, 3 M. & Cr., 496; see a very strong case in Styles v. Guy, 1 Mac. & Gor., 422.

³ Johnson v. Kendall, 20 N. H., 304.

⁴ Morley v. Morley, 2 Ch. Ca., 2, per Lord Northington; Jones v. Lewis, 2 Ves., 241, per Lord Hardwick; Massey v. Banner, 1 Jac. & Walk., 247, per Lord Eldon; and also Att'y Gen. v. Dixie, 13 Ves., 534, per Lord Eldon; Higgins v. Whitson, 20 Barb., 141; Hutchinson v. Lord, 1 Wis., 286; Litchfield v. White, 3 Sand., 545.

If the subject of the trust be money, which is to be kept for a temporary purpose, the most proper way is to deposit it in some responsible banking house.¹ But in making such deposit he should be careful to do it to the account of the trust estate, and not to his own account; for should he deposit the money to his own account, he would render himself liable for it, on the failure of the bank.² If the trustee deposits the trust funds in his own name, he thus mixes them with his own private funds, which always renders him liable in case of loss.³ Neither must the trustee so deposit the money as to put it out of his own control; if he do so, and the bank fail he will be liable;⁴ neither must he loan the money to the bank upon no other security than their notes; for this could not be distinguished from an ordinary loan on personal security, which the court never sanctions.⁵

¹ *Rowth v. Howell*, 3 Ves., 565; *Adams v. Caxton*, 6 Ves., 226; *Johnson v. Newton*, 11 Hare, 160.

² *Wren v. Kirton*, 11 Ves., 377; *Fletcher v. Walker*, 3 Mad., 73; *McDonnell v. Harding*, 7 Sim., 178; *Mathews v. Brise*, 6 Beav., 239; *Matter of Stafford*, 11 Barb., 353; *McAllister v. Commonwealth*, 30 Penn. St. Rep., 536; see also *Kirkman v. Benham* 28 Alab., 501.

³ *Lupton v. White*, 15 Ves., 432; *Chedworth v. Edwards*, 8 Ves., 46; *Duke of Leeds v. Earl Amherst*, 20 Beav., 239; *Fellows v. Mitchel*, 1 P. Wms., 83; *Massey v. Banner*, 1 Jac. & Walk., 241; *Pennell v. Deffield*, 4 DeGex., Mac. & Gor., 386, 392; see *Hart v. Bulkley*, 2 Edw., 70; *Theological Seminary of Auburn v. Kellogg*, 2 Smith, 83; see also *Spear v. Tinkham*, 2 Barb. Ch., 211; also *Gardner v. Gardner*, 1 Edw., 128; see also *Brackenridge v. Holland*, 2 Blackf., 377; *Myres v. Myers*, 2 McCord's Ch. Rep., 267; *Stanley's Appeal*, 8 Penn. St. Rep., 431.

⁴ *Salway v. Salway*, 2 R. & M., 215, 220; but see *Kilbee v. Sneyd*, 2 Moll., 186; see remarks of Lord Chancellor Hart, on pages 200, 203, 213.

⁵ *Darke v. Martin*, 1 Beav., 525; *Vigrasse v. Binfield*, 3 Mad., 62; *Walker v. Symonds*, 3 Sw., 63; *Blackwood v. Borrows*, 2 Conn. and Laws, 477; *Watts v. Girdlestone*, 6 Beav., 188; *Holmes v. Dring*, 2 Cox, 1.

Upon the principle that the trustee is required to exercise no greater care and solicitude for the interest of his *cestui que trust*, than he would for his own interest: where an executor has been robbed of the money belonging to the estate without any fault of his own, he will not be held responsible.¹ So, also, where the executor had put bonds and notes, due to his testator, into the hands of an attorney to collect, and after the death of the executor the attorney collected the money and applied it to his own use, and became insolvent: It was held that the estate of the executor was not chargeable with the loss.² But if an executor should employ a person, not being a solicitor, to foreclose a mortgage in equity, and a loss should ensue in consequence, he would be answerable.³

Purchases made by trustees, executors, administrators and guardians, when made in obedience to the duties of the trust, impose upon them personal liability; and the seller must look to them, and they to the trust estate for reimbursement.⁴

As the liabilities of trustees are based upon a breach of duty or trust, a trustee must commence, prosecute, and defend all necessary actions at law or in equity, for the enforcement or protection of the interests of the *cestui que trust*. Thus, in defending an action of foreclosure, he should demand

¹ *Furnam v. Coe*, 1 Caine's Cas., 96; *Croft v. Lindsey*, 2 Frem., 1; *Jones v. Lewis*, 2 Ves., Sr., 240.

² *Raynor v. Pearsall*, 3 J. Ch. R., 578.

³ *Wakeman v. Hazleton*, 3 Barb. Ch., 148.

⁴ *Sanford v. Howard*, 29 Alab., 684; *Harding v. Evans*, 3 Port., 221; *Lovell v. Field*, 5 Vern., 218.

the fullest proof; and in actions touching the trust estate, he is entitled, if not absolutely bound, to take every objection, even the most technical, which the law permits.¹ But the executor is not bound to maintain a contest with the heir as to the validity of the will.²

Although debts of the testator, of every description, in the hands of the executor, are assets, yet he is not to be charged with them until he has reduced them to possession.³ The rule is, an outstanding debt due the decedent is not assets in the hands of his executors or administrators, where there has been no gross negligence or collusive, fraudulent or unreasonable delay in collecting it.⁴ So, likewise, if an executor or administrator recovers at law or in equity, any damages or compensation for any injury done to the personal estate of the testator or intestate, before or since his decease, or for the breach of any covenant or contract made with the testator, or himself in his representative character, such damages become assets in his hands, but he is not chargeable with them until he reduce them into his possession.⁵ But if the executor does anything which the law deems equivalent to reducing it to possession, he will then be chargeable;

¹ *Calwalder v. Calwalder*, 26 Miss., (5 Jones,) 76; *Berrien v. McLane*, Hoff., 421; *Wood v. Burnham*, 6 Paige, 513.

² *Andrews v. Administrators*, 7 Ohio, N. S., 143.

³ See Com. Dig., Assets, (D.); Bacon's Abr., Ex'ors, (H.,) 2.

⁴ *Ruggles v. Sherman*, 14 John. Rep., 446; *Jones v. Williams*, 2 Call., 102; *Tuttle v. Robinson*, 33 N. H., 104; *Deberry v. Ire*y, 2 Jones' Eq., 370; *Douthelt v. Douthelt*, 1 Alab., 594.

⁵ *Jenkins v. Plume*, 1 Salk., 207; *Lowe v. Plaskett*, 16 C. B., 500; *Williams v. Inness*, 1 Campb., 364.

as, if he release the debt or damages, it amounts to a receipt;¹ or take an obligation in his own name;² this amounts to a discharge of the original debt or demand.

As the trustee holds the trust estate for the benefit of the *cestui que trust*, it is his duty to make the trust funds productive, by investments of it on proper securities: and, beside, it is one of the properties of his office that he shall not himself profit thereby; therefore, the court will watch vigilantly the use of the trust funds in the hands of the trustee; and if he fails to make the proper investments of them, by which they may be made productive and secure, the court will punish him by charging him with the interest, and, in case of loss, with the principal also.³ Thus, a trustee who neglects to pay over, or mixes the trust funds with his own money, must pay interest.⁴ But where money is kept on hand which is liable to be paid at any moment, he will not be charged with interest.⁵

¹ *Cocke v. Jenner*, Hob., 66; *Brightman v. Knightley*, Cro. Eliz., 43; *Williams' Ex'ors*, 1509.

² *Jenkins v. Plume*, 1 Salk., 207; S. C., 6 Mod., 181.

³ *Moyle v. Moyle*, 2 R. & M., 710; *Johnston v. Newton*, 17 Jur., 826; *Darke v. Martin*, 1 Beav., 525; see *Dennis v. Kennedy*, 19 Barb., 517; *Jennison v. Hapgood*, 10 Pick., 77; *Dexter v. Arnold*, 3 Mason, 204; *Minuse v. Cox*, 5 Johns. Ch. Rep., 441; *Hosack v. Rodgers*, 9 Paige, 461; *Schieffelin v. Stewart*, 1 Johns. Ch., 620; *Turner v. Turner*, 1 J. & W., 39; *Tickner v. Smith*, 3 Sm. & Gif., 42.

⁴ *Mumford v. Murray*, 6 Johns. Ch., 1; see *Clarkson v. De Peyster*, Hop., 424; *Ackerman v. Emmett*, 4 Barb., 626; *Rapalye v. Hall*, 1 Sandf. Ch., 399; *Theological Seminary of Auburn v. Kellogg*, 2 Smith, 83; *Ogilvie v. Ogilvie*, 1 Brad., 356; *Garnis v. Gardiner*, 1 Edw., 128; *Spear v. Tinkham*, 2 Barb. Ch.; 211; *Stevens v. Van Buren*, 1 Paige, 479; *Dunscomb v. Dunscomb*, 1 Johns. Ch., 508.

⁵ *Jaest v. Emmett*, 11 Paige, 142; see also *January v. Points*, 2 B. Monr., 406; see *Child v. Abingdon*, 1 Ves., 93; *Cassel v. Vernon*, 5 Mason, 332.

The principle is well settled, that if an executor or administrator keeps money in his hands idle, which might be safely paid out, while there is an outstanding debt, which is drawing interest, he will be charged with interest on a sum equal in amount, and at the same rate;¹ and after the payment of the debts and legacies, he must not be guilty of any laches in accounting for the surplus to those who are entitled to it; if he is, he will be charged with interest.² Nor can he excuse himself by saying that he made no actual *use* of the money, but lodged it at his bankers.³ It was a breach of trust for him to retain the money, and not make it productive to the *cestuis que trust*.

So, also, where an agent or trustee makes no effort to obtain a tenant for land of his principal, but occupies it himself, he must respond in the highest rent which could have been obtained.⁴

¹ Hall v. Hallett, 1 Cox, 134; Turner v. Turner, 1 J. & W., 39; Jennings v. Davis, 5 Dana, 132; Whiting v. Walker, 2 B. Monr., 262; see also Taw v. Earl of Winterton, 1 Ves., 451; Pocock v. Reddington, 5 Ves., 799.

² Young v. Combe, 4 Ves., 101; Longmore v. Broom, 7 Ves., 124; Roche v. Hart, 11 Ves., 58; Ashburnham v. Thompson, 13 Ves., 402; Raphael v. Boehm, 11 Ves., 92, and 13 Ves., 407, and noticed 590; Franklin v. Frith, 3 Bro. C. C., 433; Lincoln v. Allen, 4 Bro. C. C., 553; Holgate v. Haworth, 17 Beav., 259; Tew v. Winterton, 1 Ves., 451.

³ Franklin v. Frith, 3 Bro. C. C., 433; Browne v. Southhouse, 3 Bro. C. C., 107; Treves v. Townshend, 1 Bro. C. C., 384; Younge v. Combe, 4 Ves., 101; Roche v. Hart, 11 Ves., 60; Hilliard in bankruptcy, 1 Ves., 89; Dawson v. Massey, 1 Ball & Beat., 230.

⁴ Landis v. Scott, 32 Penn. St. Rep., 495.

SECTION II. INVESTMENTS BY TRUSTEES, THEIR DUTIES AND LIABILITIES IN RESPECT THERETO.

It is the duty of a trustee to so administer the trust as to make it both secure and productive to the *cestui que trust*, if that can be done. Where there are trust moneys on hand which are not required for immediate use, or by a "short day," as it is sometimes called, the trustee should, if possible, make them productive to the *cestui que trust*, by investing them on proper security. For, if he keeps funds on hand idle, when he might safely and profitably invest them, he will be chargeable with the interest himself, although he has received none.¹ The investment of trust funds by the trustee, is one of his most important duties, both as respects the interest of the *cestui que trust*, and also his own safety.

The first principle to be observed by the trustee, in making investments, is to follow, as nearly as possible, the directions contained in the trust instrument, if there are any on the subject of investment.² For, if the trust instrument should

¹ *Turner v. Turner*, 1 J. & W., 39; *Tickner v. Smith*, 3 Sm. & Gif., 42; *Fletcher v. Walker*, 3 Mad., 73; *Munch v. Cockerell*, 9 Sim., 339, 351; *Lomax v. Pendleton*, 3 Call., 538; *Garnis v. Gardner*, 1 Edw. Ch., 128; *Williamson v. Williamson*, 6 Paige, 298; *Duncomb v. Duncomb*, 1 John. Ch. R., 508; *Handley v. Snoodgrass*, 9 Leigh, 484; *Armstrong v. Miller*, 6 Ham., 118; *Chase v. Lockerman*, 11 G. & J., 185; *Dilliard v. Tomlinson*, 1 Mumf., 183; *Carter v. Cutting*, 5 Mumf., 223; *Worrell's Appeal*, 23 Penn. St. Rep., 44; *Barney v. Saunders*, 16 How. U. S., 544; see also *Lyles v. Hatton*, 6 G. & J., 122; *Turney v. Williams*, 7 Yerg., 172; *Griswold v. Chandler*, 5 N. H., 497; *Harrison v. Mock*, 10 Alab., 193.

See *Roggers v. Patterson*, 4 Paige, 409; *Burrill v. Sheil*, 2 Barb., 457.

direct any particular manner of investing, or specify the nature of the investment to be made, and the trustee should follow the directions as nearly as possible, he will not be responsible for any loss arising from such course.¹ Thus, in the absence of directions in the trust instrument to that effect, the trustee will not be justified in lending the trust funds on *personal* security.² But where he is expressly empowered to do so by the instrument creating the trust, he will not be liable.³

But a power to invest on personal or any other unusual security will be construed strictly. Thus, where joint trustees were empowered to lend on personal security, they were not permitted to lend to one of their own number, because the court thought the settler must have intended to rely upon the united vigilance of all the trustees with respect to the solvency of the borrower.⁴ Where, also, the trustees of a marriage settlement held the bond of the husband for a sum of £2,000, which, according to the trusts of the settlement, they were to permit to remain on this security

¹ Hill on Trustees, 368; see *Forbes v. Ross*, 2 Bro. C. C., 430; S. C., 2 Cox, 113

² *Darke v. Martyn*, 1 Beav., 525; *Holmes v. Dring*, 2 Cox, 1; *Vigrase v. Binfield*, 3 Mad., 62; *Walker v. Symonds*, 3 Sw., 63; *Watts v. Girdlestone*, 6 Beav., 188; *Collis v. Collis*, 2 Sim., 365; *Keble v. Thompson*, 3 Bro. C. C., 112; *Blackwood v. Borrowes*, 2 Conn. and Laws, 477; *Wormley v. Wormley*, 8 Wheat., 421; *Ackerman v. Emott*, 4 Barb., 626; *Nyce's Estate*, 5 W. & S., 254; *Swoyer's Appeal*, 5 Barr, 377; *Willis' Appeal*, 22 Penn. St. Rep., 330; *Fowler v. Reynal*, 3 Mac. & G., 500; *Gray v. Fox, Saxton*, (N. J.), 259; *Smith v. Smith*, 4 Johns. Ch. Rep., 281.

³ *Forbes v. Ross*, 2 Bro. C. C., 430; S. C., 2 Cox, 113.

⁴ ——— *v. Walker* 5 Russ., 7; *Westover v. Chapman*, 1 Coll., 177; *Stickney v. Sewell*, 1 M. & C., 14.

with the written consent of the husband and wife, or otherwise to call it in, and invest on government security with their like consent: the trustees, not requiring the written consent or any other, permitted the money to remain on the bond, and the husband became bankrupt. A composition was made by him of 16s. on the pound, and paid to the other creditors, and the fiat was annulled, the trustees consenting thereto. They did not receive the composition, and the husband again became bankrupt. After the first bankruptcy, the trustees obtained the written consent of the wife that the money should not be called in. The whole was ultimately lost, although it was held that the 16s. on the pound might have been recovered. Upon these facts it was held, first, there had been no breach of trust prior to the first bankruptcy; second, on that event it was the duty of the trustees to have called in the money; third, the subsequent consent of the wife did not protect the trustees, and fourth, that the trustees were liable for the whole amount of the £2,000, as it was impossible to say whether, if the first bankruptcy had been prosecuted, the bankrupt would have obtained his certificate.¹

So, where trustees were empowered to loan £3,000 on personal security, and they loaned £5,000, and it was lost, they were held liable for a breach of trust as having exceeded their authority.² So, also,

¹ *Wiles v. Gresham*, 24 Law J. Ch., 264; S. C. 2 Drew, 258; see also *Bateman v. Davis*, 3 Mad., 98; *Cocker v. Quayle*, 1 R. & M., 535; *Norris v. Wright*, 14 Beav., 303.

² *Poryne v. Collier*, 1 Ves., Jr., 170.

it has been held, that in a settlement, a power to lend trust money to the husband on his bond, will not authorize a loan to him on his promissory note.¹ So, also, where the trustees were authorized to lend the trust funds upon real or personal security, as should be thought good and sufficient; and these funds were in trust for A. for life, remainder for her children; and they lent the money to a person in trade, whom A. had married, and the funds were lost, the trustees were held responsible. Sir William Grant said, "the authority did not extend to an *accommodation*, and it was evident that, upon the marriage, the trustees had been induced to accommodate the husband, which was a breach of the trust."²

It is also held that a power to lend trust money on real or *personal* security does not authorize a trustee to accommodate a trader with a loan upon his bond.³ As against *legatees* and *other volunteers*, it has been held, that where there is a *discretionary* power for executors and trustees to invest on real and *personal* security, they will be justified, where, in the exercise of a sound discretion, they have lent the trust moneys to an apparently responsible person, at a reasonable interest. But the rule has been held to be different as to creditors.⁴

If the power, authorizing an investment of the

¹ Greenwood v. Wakeford, 1 Beav., 576.

² Langston v. Ollivant, Coop., 33.

³ *Ut supra*.

⁴ Forbes v. Ross, 2 Bro. C. C., 430; also 2 Cox, 113; Doyle v. Blake, 2 Sch. & Lef., 239.

trust funds on personal securities, require the observance of any particular formalities, they must be strictly followed. Thus, where the consent, in *writing*, of the wife is a prerequisite to such an investment, her *verbal* consent will not be sufficient.¹

The consequences of not following the directions contained in the trust instrument for investing the trust funds, have sometimes been visited with great severity upon the trustees. Thus, where a trustee was directed to invest a legacy immediately in stock, and he retained it for a considerable time in his own hands, and until there was a rise in the stock, he was decreed to purchase as much stock as might have been bought with the trust fund at the time when it ought to have been invested.²

In the case of *Shepherd v. Moulds*,³ Sir James Wigram, Vice Chancellor, remarked: "In this case certain property was given to trustees, upon trust, to lay it out in the purchase of government or real securities. The trustees did not lay out the property in either, but kept the money in their hands; and the only question I have to consider is, whether the trustees are to be charged with the amount of money and interest, or whether the parties inte-

¹ *Cocker v. Quayle*, 1 R. & M., 535; see *Kellaway v. Johnson*, 5 Beav., 319.

² *Byrchall v. Bradford*, 6 Mad., 235; *Watts v. Girdlestone*, 6 Beav., 188; *Clough v. Bond*, 3 M. & Cr., 496; *Phillipson v. Gatly*, 7 Hare, 516; *Bank of Va. v. Craig*, 6 Leigh, 399; *Robinson v. Robinson*, 21 Law J. Ch., 111; *Smith v. Lampton and Wife*, 8 Dana, 72; see also *Jennings v. Davis*, 5 Dana, 132.

³ 4 Hare, 500.

rested in the fund have a right to charge them with the amount of stock which might have been purchased at the time when the money was in their hands for that purpose. Where the trustees are bound, by the terms of the trust, to invest the money in the funds, and, instead of doing so, retain the money in their hands, the *cestuis que trust* may elect to charge them, either with the amount of money, or with the amount of stock which they might have purchased." But the Vice Chancellor held that, where the trustees by the terms of the trust, had a discretion to invest it in various ways, but, instead of so doing, they retained the money in their own hands, they would be liable for the money and interest only.¹

Where the direction in the trust instrument is that the trustee shall invest, on some "good and sufficient security," the security should be such as the court has been known to sanction as such:² and although such direction gives to the trustee a discretion in selecting the securities, yet he will not be authorized to select any which the rules of court do not sanction: neither, where the trust is to

¹ See the remarks of V. C. Wigram in the case of *Shepherd v. Moulds*, 4 Hare, 500, referring to *Marsh v. Hunter*, 6 Mad., 295, and also *Hockley v. Bantock*, 1 Russ., 141, and *Watts v. Girdlestone*, 6 Beav., 188; see also *Rees v. Williams*, 1 DeG. & Sm., 314, and *Robinson v. Robinson*, 9 Eng. L. and Eq., 69; but see *Ames v. Parkinson*, 7 Beav., 379, and *Ouseley v. Anstruther*, 10 Beav., 453; *Barney v. Saunders*, 16 How. U. S., 535; *Light's Appeal*, 24 Penn. St. Rep., 180; *Kenaw v. Carter*, 8 Geo., 417; *Greening v. Fox*, 12 B. Monr., 187; *Bently v. Shreve*, 2 Mad. Ch., 215; *Pettus v. Clawson*, 4 Rich Eq., 92.

² *Booth v. Booth*, 1 Beav., 125; *Trafford v. Boehm*, 3 Atk., 440; *Ryder v. Beekerton*, 3 Sw., 80, (n.); *Wilkes v. Steward, Coop.*, 6.

invest at the trustee's *discretion*, will he be authorized to loan on *personal* security.¹

Where the case is one of evident corruption, or where there is *crassa negligentia*, on the part of the trustee, the court will impose the highest rate of interest allowable; and sometimes compound interest has been charged. Thus, in the case of *Jones v. Foxhall*,² the Master of the Rolls remarked, "Generally it may be stated that if an executor has retained balances in his hands which he ought to have invested, the court will charge him with simple interest at four per cent. on these balances. If, in addition to this, he has committed a direct breach of trust, or if the fund has been taken by him from a proper state of investment, in which it was producing five per cent., he will be charged with interest at the rate of five per cent. per annum. If in addition to this, he has employed the money so

¹ *Ut supra*, and see *Pocock v. Reddington*, 5 Ves., 794, and *Wormley v. Wormley*, 8 Wheat., 421.

² *Jones v. Foxhall*, 15 Beav., 388; *Robinson v. Robinson*, 21 Law J. Ch., 111; *Knott v. Cottle*, 16 Jur., 752; *Williams v. Powell*, 16 Jur., 393; *Jones v. Morrall*, 2 Sim., (N. S.), 241; at four per cent., see *Lincoln v. Allen*, 4 Bro. P. C., 553; *Hicks v. Hicks*, 3 Atk., 274; *Littleales v. Gascoigne*, 3 Bro. C. C., 73; *Younge v. Combe*, 4 Ves., 101; *Longmore v. Broome*, 7 Ves., 124; *Roche v. Hart*, 11 Ves., 58; *Mousley v. Carr*, 4 Beav., 49; at five per cent., *Piety v. Stace*, 4 Ves., 620; *Pocock v. Reddington*, 5 Ves., 794; *Roche v. Hart*, 11 Ves., 60; *Bate v. Scales*, 12 Ves., 402; *Dornford v. Dornford*, 12 Ves., 127; *Ashburnham v. Thompson*, 13 Ves., 402; see *Utica Ins. Co. v. Lynch*, 11 Paige, 520; *Vanderheyden v. Vanderheyden*, 2 Paige, 287; *Garnis v. Gardner*, 1 Edw. Ch., 128; *Ackermann v. Emott*, 4 Barb. S. C., 626; *Wright v. Wright*, 2 McCord's Ch., 185; *Robbins v. Hayward*, 1 Pick., 528; *Diffenderfer v. Winder*, 3 G. & J., 341; *Swindall v. Swindall*, 8 Ired. Eq., 286; *Clemens v. Caldwell*, 7 B. Monr., 171; *Greening v. Fox*, 12 B. Monr., 190; *Kenan v. Hall*, 8 Geo., 417; *Barney v. Saunders*, 16 How. U. S., 542.

obtained by him, in trade or speculation for his own benefit and advantage, he will be charged either with the profits actually obtained by him, from the use of the money, or with interest at five per cent. per annum, and also with yearly rests, that is, with compound interest."

There can be no question that the court will charge the trustee with compound interest where the direction in the instrument requires him to accumulate the fund in that way.¹ In the case of *Barney v. Saunders*,² Mr. Justice Grier remarked: "On the subject of compounding interest on trustees, there is not, and indeed could not well be, any uniform rule which could justly apply to all cases. When a trust to invest has been grossly and wilfully neglected, where the funds have been used by the trustees in their own business, or profits made of which they give no account, interest is compounded as a punishment, or as a measure of damages for undisclosed profits, and in place of them. For mere neglect to invest, simple interest only is given. Six months rests have been made only where the amounts received were large, and such as could, at all times, be easily invested."³ Mr. Kent³

¹ See *Byrne v. Norcote*, 13 Beav., 336; *Raphael v. Boehm*, 11 Ves., 92, and 13 Ves., 407, 590; *Barney v. Saunders*, 16 How. U. S., 535; *Swindall v. Swindall*, 8 Ired. Eq., 285; *Jones v. Foxhall*, 13 Eng. L. and Eq., 140.

² *Barney v. Saunders*, 16 How. U. S., 542.

³ 2 Kent's Com., 231, and cites *Green v. Winter*, 1 John. Ch. Rep., 26; *Dunscomb v. Dunscomb*, 1 Johns. Ch., 508; *Schieffelin v. Stewart*, 1 Johns. Ch., 620; *Holridge v. Gillespie*, 2 Johns. Ch. Rep., 30; *Davone v. Fanning*, 2 Johns. Ch. Rep., 252; *Smith v. Smith*, 4 Johns. Ch. Rep., 281; *Evertson v. Tappan*, 5 Johns. Ch. Rep., 497; *Clarkson v. De Peyster*, Hop. Rep., 424; *Roggers v. Rogers*, ib., 515; see also *Kyle v. Barnett*, 17 Alab., 306;

remarks upon this subject thus: "If the guardian puts the ward's money in trade, the ward will be equally entitled to elect to take the profits of the trade, or the principal with compound interest to meet those profits when the guardian will not disclose them. So if he neglects to put the ward's money at interest, but negligently, and for an unreasonable time, suffers it to lie idle, or mingles it with his own, the court will charge him with simple interest, and, in case of gross delinquency, with compound interest. These principles are understood to be well established in the English Equity system, and they apply to trustees of every kind: and the principal authorities upon which they rest were collected and reviewed in the Chancery decisions in New York, to which it will be sufficient to refer, as they have recognized the same doctrine."¹

This doctrine of charging guardians, executors, and trustees, in cases of gross delinquency, with compound interest, has been deemed just and reasonable in those cases in which it has been applied, although in some instances it has been condemned.² In *Raphael v. Boehm*³ the executor was directed, from time to time, to convert the interest into prin-

Kerr v. Laird, 27 Miss., 544; Light's Appeal, 24 Penn. St. Rep., 180; Bile's Appeal, ib., 335; Worrell's Appeal, 23 Penn. St. Rep., 44; see also Kerr's Adm'r v. Sneed, 11 Bost. Law Rep., 217.

¹ See preceding note.

² See Kerr's Adm'r v. Sneed, (in the C. Court of Va.,) 11 Bost. Law Rep., 217, (Sept., 1848); English v. Henry, 2 Rawle's R., 309; Case of Peter McCall, 1 Ashm. Rep., 357; Dieterich v. Heft, 5 Barr R., 87; Tebbis v. Carpenter, 1 Madd. Ch. Rep., 290.

³ 11 Ves., 92, and 13 Ves., 407, 590; see also *ex parte Baker*, 18 Ves., 246.

cipal, and he disregarded the direction to accumulate. In *Schieffelin v. Stewart*,¹ the administrator employed the trust moneys in trade for his own benefit, and refused to give an account of the profits. In the case of *Tebbs v. Carpenter*,² the correctness of the rule, to charge compound interest, was questioned, although the Vice Chancellor admitted that a distinction ought to be taken between *negligence* and *misfeasance* or *corruption*. In the case of *Wright v. Wright*,³ it was declared that the general rule in South Carolina was adverse to allowing rest and compound interest against trustees. But the court remarked, that some cases would require it, although it might be difficult to draw with precision a line of distinction between those cases in which the rule should and should not apply.

This doctrine has also been sanctioned in the Court of Appeals in Maryland,⁴ in Kentucky,⁵ and in the Supreme Courts of North Carolina,⁶ Massachusetts,⁷ and Pennsylvania.⁸ It is, also, held in Alabama,⁹ "that compound interest is well charged against a trustee who has grossly and wilfully neglected his trust, used the trust money in his own business, or fraudulently omitted to give account of

¹ 1 Johns. Ch. Rep., 620.

² 1 Madd. Ch. Rep., 290.

³ 2 McCord's Ch. Rep., 185.

⁴ *Ringgold v. Ringgold*, 1 H. & G., 11; *Deffenderffer v. Winder*, 3 G. & J., 311.

⁵ *Hughs v. Smith*, 2 Dana Rep., 253, and *Karr v. Karr*, 6 Dana, 3.

⁶ *Hodge v. Hawkins*, 1 Dev. & Batt. Eq., 566.

⁷ *Fay v. Howe*, 1 Pick. Rep., 527, and *Boynton v. Dyer*, 18 Pick. Rep., 1.

⁸ *Harland's Accounts*, 5 Rawle's Rep., 329.

⁹ *Bryant v. Craige*, 12 Alab., 354.

profits.” In New Jersey it is provided by statute, that guardians who omit to put the ward’s money at interest by reason of fault or negligence, are chargeable with *ten per cent* interest.¹

It is the duty of the trustees to see to it that the investments are properly made; and it is no excuse that they handed over the funds to their solicitor for reinvestment, and he misapplied them,² or that they paid it over to their banker for the purpose of being invested.³

A trustee is entitled to a reasonable time to make his investments; but what will be deemed a reasonable time, must depend upon circumstances. In the case of *Dunscomb v. Dunscomb*,⁴ the trustees held the funds in their hands a number of years upon the plea that they did not know to whom to pay them. The Chancellor remarked, that this was not a valid excuse; as, in case they had any real doubt on the subject, they could have applied to the court for instruction, or brought the money into court. If, as the court had liberty to suppose, the moneys had been mingled with their own, it had answered the purpose of credit; and the rule was settled, that executors and all other trustees are chargeable with interest if they have made use of the money themselves, or have been negligent in not paying it over, or investing it. As to the time from which interest

¹ N. J. Rev. Laws, 779, sec. 11.

² *Rowland v. Witherdon*, 3 Mac. & G., 568.

³ *Challan v. Sheppam*, 4 Hare, 555; *Byrne v. Norcotte*, 13 Beav., 336; *Fletcher v. Walker*, 3 Mad., 73; *Munch v. Cockerell*, 9 Sim., 339, 351.

⁴ *Dunscomb v. Dunscomb*, 1 Johns. Ch. Rep., 509.

was to be computed on moneys permitted to be idle, there was no absolute rule. It would be laying too heavy a hand upon executors to charge them with interest from the time the money was received. In some cases, they were allowed a year to look out for some due appropriation of the money, in other cases such time would be unreasonable. In this case, the executors have shown no pains or effort to discharge themselves of the money. In a like case, in the civil law,¹ six months was the time allowed, and for that cause, the court held six months to be a reasonable time. So in the case of Worrell's Appeal,² the court remarked that, in several recent cases, they had held that six months, in ordinary cases, was a reasonable time and should be allowed for making investments. In the case of Ringgold *v.* Ringgold,³ in the Court of Appeals in Maryland, it was held, that trustees, who had invested, or who had made an effort to invest trust funds, would be allowed a rest of six months without interest as being a reasonable time within which to invest. But, if they manifested no such disposition to make such an application, no such rest would be allowed. What will be deemed a reasonable time must depend upon the peculiar circumstances of the case. Sometimes three months has been held sufficient,⁴ and, again, a year has been given.⁵

¹ Domat, B. 2, tit. Tutors, ch. 3. sec. 23; Voet, Liber 26, tit. 7, sec. 9.

² 23 Penn. St. Rep., 50.

³ Ringgold *v.* Ringgold, 1 Harris & Gill., 11.

⁴ Barney *v.* Saunders, 16 How. U. S., 544.

⁵ Cogswell *v.* Cogswell, 2 Edw. Ch., 231.

While trustees are held to great strictness in the management of the trust funds, the court will deal with them leniently when it appears they have acted in good faith. If the neglect to make the proper investment is not the result of improper motives on the part of the trustee, the court will be disposed to excuse the apparent breach of trust, unless the negligence is very gross. Where a trustee retained a sum of money in his hands, having reasonable grounds for supposing he had a right to do so, although the court decided against his right to retain the money, yet he was not charged with interest because he acted in good faith.¹ So, also, where the loss of interest has been occasioned through the ignorance of the trustee, and where there was no improper motive.² So, also, where the amount of the balance on hand is small, the trustee has sometimes been excused for not promptly investing.³ But no general rule as to the amount of balances, which a trustee will be permitted to keep unproductive, can be established; where any payments are to be made, or liabilities to be provided for, the trustee will be justified in retaining a sufficient fund to answer those purposes.⁴

In discharging the duties of the office of trustee,

¹ *Bruere v. Pemberton*, 12 Ves., 386; *Boddam v. Ryley*, 4 Bro. P. C., 561; *Hooker v. Goodwin*, 1 Sw., 485; *Parrott v. Treby*, Prec. Ch., 254.

² *Massey v. Banner*, 4 Madd., 419; also *Bruere v. Pemberton*, 12 Ves., 386.

³ *Bone v. Cooke*, 13 Price, 343; S. C., 1 McClell., 168.

⁴ See *Hill on Trustees*, 375; see also *Barney v. Saunders*, 16 How. U. S., 544; but see also *Johnston v. Newton*, 22 Law Jour. Ch., 1039; *Moyle v. Moyle*, 2 R. & M., 715; *Addams v. Caxton*, 6 Ves., 226.

it not unfrequently happens that deposits are to be made for the purpose of temporary convenience. Sums of money must be kept on hand for the payment of taxes, rents, dividends, or other occasional or periodical payments. Any occasion requiring the temporary possession of funds in the transaction of business, such as a temporary deposit pending a negotiation for the change of the trustee, or where it is deposited with a banker of good credit for remittance to the party entitled to it;¹ or where, in the performance of the trust, the trustees have contracted for the purchase of land, and have sold out stock and deposited the proceeds at a banker's,² will excuse the trustee, where he has acted in good faith, and with a reasonable degree of prudence; and he will not be liable in such cases, even though the party to whom the funds were committed should fail, and the funds be lost.³ But, if the trustee would avoid liability under such circumstances, the deposit should continue for no longer a time than is absolutely necessary; and the security of the deposit should be equal to that which reasonable prudence or proper caution would have procured.⁴

It has already been remarked that it is the duty of the trustee to make the trust funds both safe and

¹ *Adams v. Caxton*, 6 Ves., 226.

² *Freme v. Woods*, 1 Tambl., 172; *Matthews v. Brise*, 6 Beav., 239.

³ *Knight v. Lord Plymouth*, 3 Atk., 480; *Jones v. Lewis*, 2 Ves., 240; *Routh v. Howell*, 3 Ves., 564; *Johnston v. Newton*, 17 Jur., 826; *Freme v. Woods*, 1 Tambl., 172; *Matthews v. Brise*, 6 Beav., 239.

⁴ *Matthews v. Brise*, 6 Beav., 239; *Challan v. Sheppam*, 4 Hare, 555; *Drever v. Mawdesley*, 13 Jur., 330; *Aston's Estate*, 5 Whart., 228; *Bate v. Scales*, 12 Ves., 402.

productive. Although there should be no directions in the trust instrument to make an investment of the funds, it is equally the duty of the trustee to do so, and for a neglect of such duty he would be liable. In the absence of all such directions the responsibility of investing in a proper manner is thrown upon the trustee. In England, trustees can always invest in the *three per cents.* with perfect safety to themselves, as the court invariably directs all funds under its control to be invested there.¹ Every other fund than the *three per cents.* would be deemed unauthorized by the court; and the trustee would be held liable for all fluctuations or losses where he had invested in such unauthorized fund.² Thus, he may not invest in the stock of any private company, as South Sea stock, bank stock, &c.;³ and where trustees were authorized to invest in "three per cent. consols, or three per cent. reduced, or any government securities," the court refused to allow an investment on Exchequer bills, as not within the power.⁴ So, where a testator directed all his property, except ready money and moneys in the funds, to be converted, and the proceeds to be invested in three per cent. consols, or other govern-

¹ See *Trafford v. Boehm*, 3 Atk., 440; *Holland v. Hughes*, 16 Ves., 114; *Howe v. Earl of Dartmouth*, 7 Ves., 150; *ex parte Champion*, 3 Bro. C. C., 434, cited in *Franklin v. Frith*; *Jackson v. Jackson*, 1 Atk., 513; *Clough v. Bond*, 3 M. & Cr., 496.

² *Hancom v. Allen*, 2 Dick, 498; *Howe v. Earl of Dartmouth*, 7 Ves., 150; *Clough v. Bond*, 3 M. & Cr., 496.

³ *Hynes v. Redington*, 1 J. & L., 589; *Trafford v. Boehm*, 3 Atk., 440; *Mills v. Mills*, 7 Sim., 501; *Emelie v. Emelie*, 7 Bro. P. C., 259.

⁴ *Ex parte Chaplin*, 3 Z. & C., 397; but see *ex parte Southeastern Railway Co.*, 9 Jur., 650.

ment securities in England, it was held that Greek bonds, though guarantied by England, were not comprehended in the word "*funds*," and that they ought to be converted, though the court disavowed any intention of saying that bonds of that description might not, in other cases, be deemed "government securities."¹

In the United States there is no uniform rule upon the subject, unless, perhaps, such as may be deduced from this principle. Where the trust instrument gives no particular direction as to the *nature* of the securities, it would be expected that the trustee would invest either in real securities or such other stock as the court is known to have adopted, for it is a general rule, where the court has adopted a particular fund, and has thus authorized and sanctioned such fund as safe for investments, the trustee will be justified in adopting the same.² In the case of *Ackerman v. Emott*,³ it was stated to be the rule in New York, that where a general power is conferred upon persons acting in a representative capacity, to make investments, they are confined, in its exercise, to *real and government securities*; and that, under such rule, the court would sanction an investment in that State, by executors

¹ *Burnie v. Getting*, 2 Coll., 324.

² *Hancom v. Allen*, 2 Dick Rep., 498; see also *Peat v. Crane*, 2 Dick Rep., 498, note; *Ackerman v. Emott*, 4 Barb., 634; see also *Kirby v. King*, 3 Johns. Ch. Rep., 552; 2 Kent's Com., 416, note, 5th ed.; *Smith v. Smith*, 4 Johns. Ch. Rep., 281; see also remarks of Chancellor Walworth in *Eckford v. De Kay*, 8 Paige, 89.

³ *Ackerman v. Emott*, 4 Barb. S. C., 626; see also *Worrell's Appeal*, 23 Penn. St. Rep., 44; also 9 Barr, 508.

and trustees, acting under a *general power*, in loans on *real security*, or in the *public stocks* of the State, or of the United States, or in loans to the New York Life Insurance and Trust company. It was also held in the same case, that where executors or trustees, exercising a general power to make investments, go beyond the limits prescribed by law in selecting a mode of investment, neither good faith, nor care, nor diligence will protect them in the event of an actual loss. That, in such cases, they assume the risk and are responsible accordingly.¹ The same general rule has also been adopted in Pennsylvania. In the case of Worrel's Appeal,² the guardian, in addition to investing in stock of the Delaware and Hudson Canal company, and in stock of certain banks in Pittsburgh, had also purchased stock in the Schuylkill Navigation company. The first purchase of the latter stock was considerably above par. He also purchased some of the same stock on his own account, and the widow also purchased some. It was also alleged that the Board of Brokers invested in the stock of the Schuylkill Navigation company about the same time, in order to form a fund for the relief of the indigent widows and children of deceased brokers, etc. But, the court held that an investment by a guardian or other trustee, unless authorized by the deed of trust or by law, in the stock of an in-

¹ See preceding note.

² Worrell's Appeal, 23 Penn. St. Rep., 44; Hemphill's Appeal, 18 Penn. St. Rep., 303; Nyce's Estate, 5 W. & S., 254; Morris v. Wallace, 3 Barr, 319.

corporated company, is at his own risk, even though persons generally considered men of prudence have made similar investments. In giving the decision in this case, Knox, J., remarked: "One who is entitled to the appellation of a prudent man may make an investment understood to be of a speculative or experimental character. He calculates the chances and takes the risk. If fortunate, he pockets the profits; if not, he must stand the loss. But, with trust funds no such hazard can be permitted. Investments which are entirely safe, and which yield a fair return, in this country can be readily obtained, and a strict compliance in this respect should be required from those entrusted with the estate of minors and others similarly situated."¹

In Pennsylvania it would seem that where trustees are clothed with general powers to make investments, the court would not authorize an investment on real security in another State; although they would not change such an investment if it had been made according to the directions of the testator.²

The rule, as to investments, in Massachusetts and some of the other States, is less stringent. In the case of *Harvard College et al. v. Amory*,³ John McLean by his will gave and bequeathed to Jonathan Amory and Francis Amory, &c., jointly, the sum of \$50,000, in trust, nevertheless, to loan the

¹ See preceding note.

² See *Rush's Appeal*, 12 Penn. St. Rep., 375; see also *Burrill v. Sheil*, 2 Barb. S. C., 457.

³ *Harvard College v. Amory*, 9 Pick., 447; see also *Lovell v. Minott*, 20 Pick., 116; see also *Gray v. Lynch*, 8 Gill., 403; *Smyth v. Burnes' Adm'r*, 25 Miss. 422.

same upon ample and sufficient security, or to invest the same in safe and productive stock either in the public funds, bank shares or other stock, according to their best judgment and discretion, hereby enjoining on them particular care and attention in the choice of funds, and in the punctual collection of the dividends, interest and profits thereof, and authorizing them to sell out, change and reinvest the said loans and stocks from time to time, as the safety and interest of the said trust fund may in their judgment require. The trustees invested in the Fire and Marine Insurance company, the Boston Manufacturing company, and the Merrimack Manufacturing company stock, the principal part of the fund. At a Probate Court, in October, 1828, Francis Amory, the surviving trustee, presented his account as trustee, for allowance, and tendered his resignation of the trust. The amount was allowed by the probate judge and the corporations of Harvard College, and the Massachusetts General Hospital, as residuary legatees, appealed and excepted to the account; and among other reasons for such excepting, they stated, 2. "Because they (the trustees) did not invest in safe and productive stock, either in the public funds, bank shares, or other stock; but on the contrary, invested the greater part thereof in trading companies, whereby the principal sum was exposed and still continues to be exposed to great loss." The reply of the trustee to this part of the exceptions, among other things stated, "that the investment actually made was by taking parts, in due proportion, at the market value,

of that property wherein the testator appeared to have the greatest confidence,¹ and that all the property selected is known in the acts of incorporation as well as in common parlance, by the name of stock," etc. To which the appellants replied, among other things, "that the fact that a large amount of the testator's property consisted of such stocks, did not authorize the trustees thus to invest, etc., as the testator was at liberty to *speculate*; but the trustees were required to loan on sufficient security, or invest in stock which would be safe as well as productive." The court, in giving their opinion, remarked, "It is argued by the appellants, that the trustees have not loaned the money on good security. The answer is found in the authority which the testator gave them. They were to loan, or to invest the fund in stocks. They preferred the latter. But it is argued that they did not invest in the *public funds, bank shares, or other stock*, within the true intent and meaning of the authority, but in trading companies, and so exposed the capital to great loss. And we are referred to *Trafford v. Boehm*² to prove the position that such an investment will not have the support of a Court of Chancery. The Chancellor seems to suppose that funds or other good securities must be such as have the engagement of the government to pay off their capital. Bank stock and South Sea stock which were in the management of directors, &c., were not

¹ See remarks of Justice Putnam in this case, also *Thompson v. Brown*, 4 J. C. R., 628, and *Roth v. Howell*, 3 Ves., 565.

² *Trafford v. Boehm*, 3 Atk., 444.

considered by that court as good security. But no such rule has ever been recognized here. In point of fact, there has been as great fluctuation in the value of stocks which was secured by the promise and faith of the government, as of the stock of banks. And, beside, the testator himself considers that *bank shares* might be a safe object of investment, safe and productive stock. And yet bank shares may be subject to losses which may sweep away their whole value." In conclusion the court remarked that "it would not do to reject those stocks as unsafe which were in the management of directors whose well or ill directed measures may involve a total loss. Do what you will the capital is at hazard. Investments on mortgage of real estate are not always safe. Its value fluctuates more, perhaps, than the capital of insurance stock; and title may fail, etc. All that can be required of a trustee to invest is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to *speculation*, but in regard to the *permanent* disposition of their funds, considering the probable income, as well as the probable safety of the capital invested."

In the case of *Lovell v. Minot*,¹ the court held that a loan by a guardian, upon the promissory note of the borrower, payable in one year, with interest, secured by a pledge of shares in a manufacturing corporation, the amount of the loan being about

¹ *Lovell v. Minott*, 20 Pick., 116.

three-quarters of the par value of the shares, and less than three-quarters their market value, was an investment made in the exercise of such a sound discretion on the part of the guardian, that although the borrower failed before the note became due, and the shares fell in value below the amount of the note, the guardian was not to be held responsible for the loss. And further, "the guardian having sold the shares, and taken the purchaser's note for the price, with two endorsers, and the notes of a third person, secured by mortgage on land, he was held to have exercised a sound discretion, and not to be responsible for a loss occasioned by the failure of all the parties to the notes, and a fall in the value of the mortgaged premises." In giving the decision in this case, Shaw, C. J., expressly affirmed the doctrine in the case of *Harvard College v. Amory*, and said that we had no public securities in this country which would answer the requirements of an English Court of Equity.¹

In Maryland there is no favored stock in which it is always deemed safe to make investments. Therefore, where a testator purchased certain stocks, and by his will, gave them to a trustee for the use and benefit of his daughter, and her children, without delegating to any one a power to change the investment, it was held, that it was not proper for the trustee, without some express authority from some competent tribunal, to dispose of those stocks and invest the money in other securities, and if he

¹ *Lovell v. Minott*, 20 Pick., 119.

did so, upon proper application, he would be decreed to replace them; and if replaced at a *less* sum, he would be compelled to invest the surplus in the same stocks and to the same use. As there is no favorite stock, as in England, for the investment of trust moneys, there is always some difficulty, where the parties do not agree, in making a proper selection; therefore, there is more reluctance on the part of the court, than in England, in changing an investment made by the author of the trust; and they will not do it, unless impelled to do so by considerations of the most pressing character.¹

In New Jersey, in the case of *Gray v. Fox*,² the court remarked that "in this country there were few opportunities for investing in the public stocks; the stocks of private companies are deemed unsafe, and investments in that species of stock would scarcely be encouraged by a Court in Equity; and there is no other but landed security that would come within the rule; and the court would advise it to be taken in all cases where public stock cannot be had." From the remarks of the court it is to be inferred that no other security than the public stock or real estate would be deemed "*due security*," in New Jersey.³

They have also provided by statute,⁴ that

¹ *Murray v. Feinour*, 2 Md. Ch. Dec., 418; see also *Evans v. Inglehart*, 6 Gill. & Johns., 192.

² *Gray v. Fox*, Sax. Rep., 259.

³ See the remarks of the Chancellor in the case of *Gray v. Fox*, Saxton's Ch. Rep., 264, and the English authorities cited by him, where he fully endorses the English rule.

⁴ Rev. Code, 1847, p. 209, sec. 14; see also *Elmer's Dig. of N. J. Laws*, by Nixon, 1855, p. 553, sec. 14.

executors, administrators, trustees and guardians, may, by leave and direction of the Orphan's Court, put out to interest all moneys in their hands which they are or may be lawfully required to retain, whether the same belong to minors, legatees or other person or persons, whomsoever, upon such security and for such lengths of time as the court shall allow of; and, if such security so taken, *bona fide*, and without fraud, shall happen to prove insufficient, it shall be the loss of the minors or other person entitled thereto; and it shall be the duty of executors, administrators, trustees, and guardians, in cases where the estates of minors or other persons in their hands may be materially benefited thereby, to make application to the Orphan's Court for such leave and direction, and in case they shall neglect to do so, they shall be accountable for the interest that might have been made thereby. But, if no persons who may be willing to take said money at interest, giving security, can be found by the said executors, administrators, trustees, or guardians, nor by any other friend or friends of said minors or other persons, then the said executors, &c., shall be accountable for the principal money only until the same can be put out at interest, &c.; but, in case they make use of such money themselves, they shall be required to pay interest on such principal.¹

In many of the States there are provisions by statute authorizing investments in certain stocks.

¹ See preceding note.

In Pennsylvania, the stock or public debt of the United States, the public debt of the Commonwealth, or of the city of Philadelphia, stock in the incorporated townships and districts of Philadelphia county, of Pittsburgh and Alleghany, and the stock of the water works of Kensington, Philadelphia county.¹ In Maine, it is also provided by statute,² that "any probate judge having jurisdiction of the trust, and the Supreme Judicial Court in any county, on the application of the trustee, or of any person interested in the trust estate, after notice to all others interested, may authorize or require the trustee to sell any real or personal estate held by him in trust and invest the proceeds thereof, and also any other trust moneys in his hands, in *real estate*, or in any other manner most for the interest of all concerned therein; and give such further direction, as the case requires, for managing, investing and disposing of the trust fund according to the provisions of the will."² But, in such disposition, the court will not interfere with the legal and valid directions of the testator, nor will they exercise any discretionary powers committed personally to the trustee.³ In Michigan, the Judges of Probate in their respective counties, and the Supreme and

¹ Act 29 March, 1832, Dunlop, 471, sec. 14; see also acts 13 April, 1838, 15 April, 1850, 8 April, 1851; see the remarks of the Court on this subject, Twaddell's Appeal, 5 Barr, 15; also 9 Barr, 508; Barton's Estate, 1 Pars. Eq., 24.

² Rev. Stat., 1857, ch. 68, sec. 9, p. 436. For similar provisions in New Hampshire and Vermont, see N. H. Rev. Stat. 1853, p. 427, sec. 9, and Verm. R. S. 1839, tit. 12, ch. 55.

³ Littlefield v. Cole, 33 Maine Rep., 552.

Circuit Courts, when setting in such county, may, on application of the trustee, or other person interested in the trust estate, authorize or require the trustee to sell any stock in the public funds, or in any bank, insurance company, or other corporation, or any other personal estate or effects held in trust, and invest the proceeds thereof, and also any other trust moneys in his hands, in real estate, or in any other manner that shall be most for the interest of all concerned therein.¹

The statute of Missouri provides,² that guardians and curators shall put the money of minors entrusted to their hands to interest upon mortgage or other sufficient security, for all sums under five hundred dollars, to be approved by the court; or they may, by leave of the court, and with the assent of their securities, retain the money in their own hands, paying interest therefor. And when no one can be found to take the money upon interest, and the guardian or curator do not choose to take it upon interest themselves, they are not to be charged with interest until the same can be put out at interest. The interest in such cases is to be paid annually, and when not paid at the end of the year, it is to be added to the principal, and bear interest as such, without it being necessary to renew the mortgage or other security.

¹ Rev. Stat. Mich., 1838, p. 301, sec. 11.

² Rev. Stat. Missouri, p. 551, sec. 23. For special provisions in Virginia, see Rev. Code, 1849, pp. 552, 553, sec. 24, 25; and see title "Fiduciaries Generally," tit. 39, p. 546, for general provisions on the subject of the accountability of trustees.

An examination of the leading American authorities would seem to justify the conclusion, that where the trust instrument has left the *manner* of investing the trust funds to the discretion of the trustee, and where there is no fund sanctioned by the court in which to invest, the safer way will be for the trustee to invest on unquestionable *real security*. Such security has been approved by the courts in nearly or quite all of the States, and *less* than this has been questioned in *very many* of them.¹

A question has sometimes arisen as to what constitutes real security. In Pennsylvania an investment in the loans of the Lehigh Navigation company, owning coal lands and a canal to a much greater value than its debts, the interest on the loan being a preferred claim on the income, was held to be substantially on real estate.² As a general rule trustees cannot invest by *purchasing* real estate with the trust moneys; because the *cestui que trust*, in such cases, is at liberty to elect whether he will take the real estate, or the money and interest. This right of the *cestui que trust* to elect, has been considered in a former chapter.³ But in Massachusetts, under

¹ But see *H. College v. Amory*, 9 Pick., 447; *Lovell v. Minott*, 20 Pick., 116; *Gray v. Lynch*, 8 Gill., 403; *Smyth v. Burns' Adm'r*, 25 Miss., 422; *Kimball v. Reading*, 11 Foster, (N. H.,) 352.

² *Twaddle's Appeal*, 5 Barr, 15; but see *Worrell's Appeal*, 9 Barr, 508, and 23 Penn. St. Rep., 44; see also *Rush's Estate*, 12 Penn. St. Rep., 375; *Hemphill's Appeal*, 18 Penn. St. Rep., 303.

³ Pages 145, 481; see also *Ousely v. Anstruther*, 10 Beav., 456; *Bonsall's Appeal*, 1 Rawle, 273; *Billington's Appeal*, 3 Rawle, 55; *Kaufman v. Crawford*, 9 W. & S., 31; *Rogers' Appeal*, 11 Penn. St. Rep., 36; *Wiswald v. Stewart*, 32 Alab., 433; *Bellamy v. Bellamy's Adm'r*, 6 Flor., 62; *Pugh v. Pugh*, 9 Ired., 132.

a direction to *invest* in stocks or *productive real estate*, it has been held, that it authorized the *purchase* of land or dwelling houses, or the *purchase* of the widow's right of dower, upon such terms as to make the estate, when disencumbered, productive in proportion to its cost.¹ So, likewise, it has been held in Pennsylvania, that in case of imminent necessity a guardian may buy in real estate,² and also that an administrator might buy in a debtor's land under a judgment against him, where there was danger of losing the debt in the whole or in part, by his failing to do so.³

Where the trust property is already invested on personal securities, or any other which the court could not sanction, were the trustees to invest in them, it often becomes a difficult question to determine how far it is the duty of the trustee to call in such funds and invest them in approved securities. Where the trust instrument directs their immediate conversion, there can be little doubt as to the duty of the trustee; or where, during the administration of the trust, the court has so ordered it.⁴ But where it is left to the discretion of the trustee, he must act in the utmost good faith, and not be guilty of gross negligence in making such conversion. In general it is well settled that it is the duty of trustees to call in any part of the trust fund

¹ *Parsons v. Winslow*, 16 Mass., 368.

² *Bonsall's Appeal*, 1 Rawle, 273.

³ *Billington's Appeal*, 3 Rawle, 55; see also *Oeslager v. Fisher*, 2 Penn. St. Rep., 467.

⁴ *Sowerby v. Clayton*, 8 Jur., 597.

which they find standing out on mere personal security, even though there be no specific directions in the trust instrument requiring them to do so.¹

It has been held, that an express power for the trustees to vary the securities will not authorize a change to be made without any apparent object or prospect of benefiting the trust estate; and should the trustees dispose of existing securities without having in contemplation an immediate reinvestment, they will be responsible for any losses which might occur.²

It is a general rule, where the investment has been made in pursuance of the directions of the testator, it cannot be changed except by the consent of all parties interested; and where there are *cestuis que trust* not *in esse* the court will not direct the change to be made.³ But, in the case of *Perroneau v. Perroneau*,⁴ where the testator died shortly after the close of the revolution, and before the constitutional government was established, and, having doubt as to the stability of the government, had directed his executors to invest in the funds in England, the court, on the restoration of confidence

¹ *Clough v. Bond*, 3 M. & Cr., 496; *Powell v. Evans*, 5 Ves., 839; *Caffrey v. Darby*, 6 Ves., 488; *Tebbs v. Carpenter*, 1 Mad., 297; *Willis' Appeal*, 22 Penn. St. Rep., 330; *Hemphill's Appeal*, 18 Penn. St. Rep., 308.

² See *Brice v. Stokes*, 11 Ves., 324; *De Manneville v. Crompton*, 1 V. & B., 359; *Hanbury v. Kirkland*, 3 Sim., 365; *Watts v. Girdlestone*, 6 Beav., 190.

³ See *Wood v. Wood*, 5 Paige, 596; *Deadrick v. Cantrell*, 10 Yerg., 263; *Contee v. Dawson*, 2 Bland., 264; *Burrill v. Sheil*, 2 Barb. S. C., 457; *Trustees Transylvania University v. Clay*, 2 B. Monr., 386.

⁴ *Perroneau v. Perroneau*, 1 Desau., 521.

under the constitution, ordered the funds to be invested in this country.

But where *cestuis que trust*, who are *sui juris*, have consented to or acquiesced in an investment by a trustee, they cannot afterwards question its propriety, even though the investment should amount to a breach of trust.¹ And the interest of the *cestui que trust*, with whose concurrence the investment was made, is *primarily* liable to make good to the trust estate any loss which may be thus occasioned,² and the court went so far as to hold, that the *cestui que trust* concurring in such investment, if he derived any actual benefit from the commission of the breach of trust, should recoup the trustee to the amount of any such benefit.³

SECTION III. LIABILITIES OF TRUSTEES IN RESPECT TO REMAINDERMEN.

Where there is a limitation over of the trust estate, the trustee, in administering the trust, must consult the interest of those entitled in remainder, as well as those to whom the immediate beneficial enjoyment is given; for it would be a breach of his duty to permit any advantage to be given to either

¹ *Brice v. Stokes*, 11 Ves., 324; *Langford v. Gascoigne*, 11 Ves., 333; *Nail v. Punter*, 5 Sim., 555; *Walker v. Symonds*, 3 Sw., 64; *Lockhart v. Reily*, 39 Eng. L. and Eq. Rep., 135.

² *Booth v. Booth*, 1 Beav., 125; *Fuller v. Knight*, 6 Beav., 205; *Raby v. Ridelhalgh*, 24 L. J. Ch., 528, and 19 Jur., 336; *Band v. Fardell*, 19 Jur., 1214.

³ *Booth v. Booth*, 1 Beav., 125; *Raby v. Ridelhalgh*, 24 L. J. Ch., 528; *Band v. Fardell*, 19 Jur., 1214.

at the expense of the other.¹ In the absence of any express direction in the trust instrument, to the contrary, the trustee will be entitled to the possession and management of the estate where the nature of his duties requires that he should have the controlling power.² Thus, in the case of *Tidd v. Lister*,³ a testator had devised and bequeathed all his real and personal estate to trustees, upon trust, to pay his funeral expenses and debts; to keep the buildings upon the estate insured against fire; to satisfy the premiums upon two policies of insurance on the lives of his two sons; to allow his said sons an annuity of sixty guineas each, and subject thereto, upon trust, for his daughter for life, with remainders over. The debts, funeral expenses, and annuities were discharged by the *personal* estate, whereupon the daughter, a *feme covert*, filed a bill, praying to be let into possession upon securing the amount of the premiums of the policies. But, Sir John Leach said: "It is perfectly plain, from the continuing nature of this trust, that the testator intended the actual possession of the trust

¹ *Langston v. Ollivant*, Coop., 33; *Stuart v. Stuart*, 3 Beav., 420; *Pechel v. Fowler*, 2 Anst., 550; *Mortlock v. Buller*, 10 Ves., 308, 309; *Lord Mahon v. Earl Stanhope*, cited 2 Sug. Pow., 512; *Cowgill v. Lord Oxmantown*, 3 Y. & C., 369; *Watts v. Girdlestone*, 6 Beav., 188; *Marshall v. Sladdan*, 4 De Gex & Sim., 468; see also *Moseley v. Marshall*, 22 N. Y. Rep., 200.

² *Hill on Trustees*, 384; *Lewin on Trusts*, &c., 586; *Young v. Miles' Ex'ors*, 10 B. Monr., 290.

³ *Tidd v. Lister*, 5 Mad., 429; *Blake v. Bunbury*, 1 Ves., Jr., 194, also 514; 4 Bro. C. C., 21, 28; *Young v. Miles' Ex'ors*, 10 B. Monr., 290; *Jenkins v. Milford*, 1 J. & W., 629; [but where a *cestui que trust for life* is let into possession, the court will require the necessary security: see *Baylies v. Baylies*, 1 Col., 537; *Denton v. Denton*, 7 Beav., 388; *Pugh v. Vaughn*, 12 Beav., 517;] see also *Langston v. Ollivant*, Coop., 33.

property should remain with the trustees; and it did appear to me a singular proposition, that, if a testator who gives, in the first instance, a beneficial interest for life only, thinks fit to place the direction of the property in other hands, which is an obvious means of securing the provident management of that property for the advantage of those who are to take in succession, it should be a principle in a Court of Equity to disappoint that intention, and to deliver over the estate to the *cestui que trust* for life, unprotected against that bias which he must naturally have, to prefer his own interest to the fair right of those who are to take in remainder. Independently of the purpose of management of the property, a testator may be considered, in case of a female *cestui que trust* for life, as having a further view to her personal protection in the case of marriage. There may be cases where it may be plain *from the expressions in the will*, that the testator did not intend the property should remain under the personal management of the trustees. There may cases in which it may be plain from the *nature of the property*, that the testator could not mean to exclude the *cestui que trust* for life from the personal possession of the property; and, there may be very special cases in which this court would deliver the possession of the property to the *cestui que trust for life*, although the testator's intention appeared to be that it should remain with the trustees;¹ as, where the personal occupation of the trust property was beneficial

¹ See *Moseley v. Marshall*, 22 N. Y. Rep., 200.

to the *cestui que trust*, there the court, by means to secure the due protection of the property for the benefit of those in remainder, could, in substance, be performing the trust according to the intention of the testator.”¹

Where the tenant for life takes both the legal and equitable estate, the right of possession usually follows the title. But the *tenant for life*, in such case, is trustee for the remaindermen, and may be called to an account as such.²

It is the duty of the trustee to protect the estate of the remainderman against the acts of the equitable tenant for life, by preventing him from doing any act which is an injury to the reversion. Thus, an equitable tenant for life mortgaged his life estate as security to his creditors; and then cut down and sold the timber, by which the reversion was injured. It was held that, as against mortgages and incumbrances on the life estate, the remainderman had an equitable claim to have the injury to the inheritance made good, and, for that purpose, had a lien on the rents and profits in the hands of the trustee.³

Where the beneficial enjoyment of movable articles and personal estate, as plate, furniture, etc.,

¹ See note 3, p. 617.

² *Clark v. Saxton*, 1 Hill's Eq., 69; *Horry v. Glover*, 2 Hill's Eq., 515; *Shibley v. Ely*, 2 Halst. Ch., 181; *Joyce v. Gunnells*, 2 Rich. Eq., 259; see also *Broom v. Curry's Adm'r*, 19 Alab., 805; *Wilson v. Edmonds*, 4 Foster, 545.

³ *Briggs v. Earl of Oxford*, 19 Jurist, 817; *Freeman v. Cook*, 6 Ired. Eq., 376; *Woodman v. Good*, 6 W. & S., 169; *Whitfield v. Bennett*, 2 P. Wms., 242; *Duke of Leeds v. Lord Amherst*, 14 Sim., 357; *Morris v. Morris*, 15 Sim., 510; *Marker v. Marker*, 9 Hare, 1; *Davies v. Lee*, 6 Ves., 786.

is given for life, with a limitation over, the first taker of the articles specifically bequeathed, is not required, in the first instance, to do any more than give an inventory or schedule of the articles, signed by himself.¹ But, where there is cause to fear that the tenant for life will waste, secrete, or carry off the property, and not restore it at the termination of his estate therein, the party in remainder may apply to a Court of Equity for an order for security; and, if need be, for an injunction against their removal.²

Where the gift for life is of things *quæ ipso usu consumuntur*, as corn, and wine, etc., and is also *specific*, it is a gift of the absolute property; and a limitation over, in such case, would be void.³ But if the gift is *residuary or general*, the things must be sold, and the interest of their produce be paid to

¹ *Bill v. Kynaston*, 2 Atk., 82; *Leeke v. Bennett*, 1 Atk., 471; *Covenhoven v. Shuler*, 2 Paige, 122; *De Peyster v. Clendinning*, 8 Paige, 295; *Spear v. Tinkham*, 2 Barb. Ch., 211; *Emmons v. Cairnes*, 3 Barb., 243; *Wescott v. Cady*, 5 Johns. Ch., 334; *Langworthy v. Chadwick*, 13 Conn., 42; *Hudson v. Wadsworth*, 8 Conn., 363; *Nance v. Coxe*, 16 Alab., 125; *Henderson v. Vaulx*, 10 Yerg., 30; *Cheshire v. Cheshire*, 2 Ired. Eq., 569; *Mortimer v. Moffatt*, 4 Hen. & Munf., 503; *Slanning v. Style*, 3 P. Wms., 336; *Williams' Ex'ors*, 1259.

² *Covenhoven v. Shuler*, 2 Paige, 122; *Ramey v. Green*, 18 Alab., 771; *Lippencott v. Warder*, 14 S. & R., 118; *Kinnard v. Kinnard*, 5 Watts, 108; see also *Westcott v. Cady*, 5 Johns. Ch. Rep., 334; *Langworthy v. Chadwick*, 13 Conn., 42; *Swan v. Ligan*, 1 McCord's Ch., 227; *Bill v. Kynaston*, 2 Atk., 82; *Braswell v. Morehead*, 1 Busb. Eq., 26; *Frazer's Adm'r v. Bevell*, 11 Gratt., 9; *Foley v. Burnell*, 1 Bro. C. C., 279.

³ *Williams on Ex'ors*, 1259; *Tyson v. Blake*, 22 N. Y. Rep., 558; see also *McLean v. McDonald*, 2 Barb. S. C., 537; *McDonnald v. Walgrove*, 1 Sand. Ch., 275; *Wright v. Miller*, 8 N. Y. Rep., 25, and authorities cited; *Scott v. Perkins*, 28 Maine Rep., 22; see also *Shaw v. Huzzy*, 41 Maine, 495.

the legatee for life.¹ The rule is general, that where a testator makes a *general* gift of his estate, or of the *residue* generally to, or in trust for a person for life, with remainder over, so much of the property as consists of leaseholds, or terminable annuities, or other interest of a perishable nature, must be converted into funds, and invested in permanent securities for the benefit of the remainderman.²

In respect to such gifts, it is the duty of the trustee to protect the interests of the remainderman, and not permit the tenant for life to consume the property or appropriate the principle to his own use, and this he can do by application to the court. But if, regardless of the interests of the remainderman, the trustee permits the tenant for life to receive the whole income arising from the perishable securities, if the tenant is not able to refund, or fails to do so, the trustee himself will be answerable to the remainderman for what he has

¹ *Randall v. Russell*, 3 Meriv., 194; *Andrew v. Andrew*, 1 Coll., 690; see *Porter v. Tournay*, 3 Ves., 314; *Clark v. Clark*, 8 Paige, 152; *Cairns v. Chaubert*, 9 Paige, 160; *Spear v. Tinkham*, 2 Barb. Ch., 211; see also *Williamson v. Williamson*, 6 Paige, 298; *Covenhoven v. Shuler*, 2 Paige, 122; *Emmons v. Cairns*, 3 Barb., 243; *Eichelburger v. Barnetz*, 17 S. & R., 293; *Woods v. Sullivan*, 1 Swan, 507; *Bradner v. Falkner*, 2 Kern., 472; *Booth v. Ammerman*, 4 Brad., 132.

² *Hill on Trustees*, 386; *Howe v. Earl of Dartmouth*, 7 Ves., 137; *Fearn v. Young*, 9 Ves., 552; *Dimes v. Scott*, 4 Russ., 200; *Alcock v. Sloper*, 2 M. & K., 701; *Mills v. Mills*, 7 Sim., 501; *Pickering v. Pickering*, 2 Beav., 57; S. C., 4 M. & Cr., 298; *Litchfield v. Baker*, 2 Beav., 481; *Benn v. Dixon*, 10 Sim., 636; *Cairns v. Chaubert*, 9 Paige, 160; *Clark v. Clark*, 8 Paige, 152; see 2 *Leading Cases in Equity*, p. 263, *et seq.* [*Howe v. E. of Dartmouth*, and at p. 279 see *Benn v. Dixon* and authorities]; *Covenhoven v. Shuler*, 2 Paige, 132; *Eichelburger v. Barnetz*, 17 S. & R., 293; *Wooten v. Burch*, 2 Md. Ch., 190.

lost thereby.¹ The tenant for life, is bound in the first place to recoup the remainderman, in such a sum as he had received over and above what he would have received if the conversion had been duly made, and he had received only his interest.²

Vice Chancellor Parker stated the principles which govern a Court of Chancery on this subject, thus: "The personal estate of the testator may be considered as divided into three different classes: First, property which is found at the testator's death invested in such securities as the court can adopt, as money in the funds or on real securities. The tenant for life is entitled to the whole income of this. Secondly, property which can be converted into money without sacrificing anything by a forced sale. As to this the rule is clear. It must be converted, and the produce must be invested in securities which the court allows, and the tenant for life is entitled to the income of such investment. Thirdly, property which according to a reasonable administration is not capable of an immediate conversion and which cannot be sold immediately without involving a sacrifice of both principal and interest. In this case, the rule is to take the value of the testator's interest, and to give the tenant for life the income of that present value."³

¹ *Howe v. Earl of Dartmouth*, 7 Ves., 137; *Dimes v. Scott*, 4 Russ., 200; see also 2 *Leading Cases in Equity*, p. 263; *Williamson v. Williamson*, 6 Paige, 298.

² *Howe v. Earl of Dartmouth*, 7 Ves., 137; *Mills v. Mills*, 7 Sim., 509; *Randall v. Russell*, 3 Meriv., 194, 195.

³ *Meyer v. Simonson*, 21 Law J. Ch., 678; see also *Moseley v. Marshall*, 22 N. Y. Rep., 205; *Howe v. Earl of Dartmouth*, 7 Ves., 137; also *Leading Cases in Equity*, vol. ii., p. 262.

As, in these cases, the trustee in settling his accounts, will be allowed for payments made to the tenant for life, such a sum only as the tenant was entitled to receive, it becomes important for the trustee to ascertain accurately the rights of the tenant for life, and his liability in such cases. Thus, where a testator had devised to his wife his dwelling house in fee, subject to any mortgage which might exist upon it at the time of his death, and it was subject to a mortgage at the date of the will, which remained unpaid at the testator's death. He also bequeathed to her his furniture, horses and carriages, &c.; and he likewise devised to her the premises known as "The Mansion House," during her natural life, "and all and several the rents and profits thereof." In the third clause of the will the testator directed as follows: "I will and direct that all the rest and residue of my personal estate of every kind not hereinbefore disposed of, be applied to the payment of my debts and liabilities, excepting that which is secured by mortgage on my said dwelling house; and that the remainder of my said debts, over and above what can be paid thereby, be and remain a charge on my said Mansion House property, to be paid therefrom after the life estate of my wife therein: and for that purpose I hereby empower my executors, hereinafter named, if practicable, to defer the payment of any existing mortgage or mortgages, on said Mansion House property during the lifetime of my said wife, or to make a loan or loans for the payment of the same or any part thereof, to be paid therefrom after the decease

of my said wife." The testator gave the residue of his estate, real and personal, to the respondents, Mrs. Marshall, E. B. Coe, and Mrs. Leslie; the first named a sister of his wife, and the other two his nephew and neice. The Mansion House property was the only real estate which passed under the *residuary* clause. It yielded a net annual income of \$4,000. At the time of making the will, and also at the time of the death of the testator, it was subject to three mortgages, amounting to \$12,000, for which the creditors held his bonds. The executor paid the interest on these mortgages during the life of the widow, and charged it to the account of the *residuary estate*; and, after the death of the widow, filed his accounts before the surrogate for a settlement. It appeared by his accounts, and which, with the exception of these charges for interest, were allowed, that the personal property sufficed to pay the debts, except the mortgages, and to keep down the interest on those upon the Mansion House during the lifetime of the devisee for life; and that there was left at the time of her death, about two thousand dollars, being the amount of a mortgage due the testator's estate, which had not been collected.

The Surrogate decided that the devisee for life was bound to pay the interest on the mortgages on the Mansion House property, out of the rents and profits, during the continuance of her life estate, and that the payments made by the executor for that purpose, were misapplications of the moneys of the estate, and he required him to account for the

money so paid, with interest. The executor appealed to the Supreme Court, where the decision of the Surrogate in respect to those payments, was in principle affirmed. He then appealed to the Court of Appeals.

In giving the decision in the Court of Appeals, Denio, J., remarked: "It is a well established principle, that where there is an estate for life, and a remainder in fee, and there exists an incumbrance binding the whole estate, in the lands, and no special equities between the remainderman and the tenant for life can be shown, the latter is bound to pay the interest accruing during the continuance of his estate, and the owner of the future estate is to pay off the principal of the lien:"¹ and had the testator stopped with the creation of such estates, this rule would have decided the rights of the parties. But in this case, the testator had clearly evinced his intention, that the widow should have, among other things, the clear use of the Mansion House property during her natural life, "*and all and several the rents, issues and profits thereof.*" That the *manner and means* by which he directed the payment of the mortgages, shows that they were to be paid, if practicable, at the expense of the remainderman and not of the widow. Consequently the court *held* that the judgment of the Supreme Court

¹ *Moseley v. Marshall*, 22 N. Y. Rep., 202; see also *House v. House*, 10 Paige, 158; 4 Kent's Com., 75; *Morley v. Morley*, 35 Eng. L. and Eq., 220; *Lord Kensington v. Bouverie*, 31 Eng. L. and Eq., 345; *Revel v. Watkinson*, 1 Ves., 93; *Amesbury v. Brown*, 1 Ves., 480; *Traey v. Herford*, 2 Bro. C. C., 128; *Hunt v. Watkins*, 1 Humph., 498; *Hepburn v. Hepburn*, 2 Brad., 74.

and the sentence of the Surrogate should be reversed, and that the account of the executor should be adjudicated upon the principle herein stated: and that the judgment, if not agreed on by the counsel for the parties, should be settled by one of the judges of this court.¹

It is the *intention* of the testator which is to prevail in determining the relative rights of the tenant for life and the remaindermen; and, consequently, in determining the duties and liabilities of the trustee. Although it is a well settled principle of law, that where *perishable, wasting* or *reversionary* property is given to persons in succession, it should be converted into permanent funds, and the interest only be given to the tenant for life, yet where such property is given *specifically* in the strict sense of that term, it is held that there can be no reason for converting it.²

If an intention, that the property bequeathed should be enjoyed *in specie*, as it existed at the death of the testator, can be gathered from the will, although it is not in a technical sense *specifically* bequeathed, it ought not to be converted.³ Thus, it has been held, that an express direction for sale at a particular period, indicates an intention that there should be no previous sale or conver-

¹ Moseley v. Marshall et al, 22 N. Y. Rep., 202.

² Lord v. Godfrey, 4 Mad., 455; Bethume v. Kenneday, 1 My. & Cr., 114; Evans v. Jones, 2 Coll., 516; Marshall v. Bremner, 2 Sm. & G., 237; Mills v. Brown, 21 Beav., 1; Fielding v. Preston, 5 W. R., 851; Hinves v. Hinves, 3 Hare, 611.

³ Hinves v. Hinves, 3 Hare, 611; Mackie v. Mackie, 5 Hare, 70, 77; Neville v. Fortescue, 16 Sim., 333.

sion.¹ The difference between a *general* and *specific* legacy, as administered by the court, is according to the supposed different intention of the testator, evinced thereby. Where books, furniture, and other specific chattels are *specifically* bequeathed by will, the presumption is, that it was the intention of the testator they should be used by the legatee *in the form in which they were given*; and the remainderman must take them subject to the deterioration which they will have undergone by the lapse of time and by use.² But this often seems to be unjust between the first taker and the remainderman. Hence, the presumption of equity is strongly against this course; and where specific chattels, instead of being given *specifically*, form a part of a *general residuary* bequest for life, with limitation over, the object of the testator will be presumed to have been to give the first taker the *mere interest* on the fund produced, and the executor will be bound to convert the whole into cash, and either invest it for the purposes of the will, or pay it over on receiving security, as in the case of pecuniary legacies.³ But after all, the rules thus laid down will be varied to suit the purposes of the testator as gathered from

¹ *Alcock v. Slopier*, 2 My. & K., 699; *Daniel v. Warren*, 2 Y. & C. C. C., 290; *Goodenough v. Tremamondo*, 2 Beav., 512; *Crow v. Crisford*, 17 Beav., 507; *Hind v. Selby*, 23 Beav., 373; *Wearing v. Wearing*, 23 Beav., 99; *Bowden v. Bowden*, 17 Sim., 65.

² *Dunbar v. Woodcock*, 10 Leigh, 628; *Hale v. Burrodale*, 1 Eq. Ca. Abr., 461; *Bracken v. Bentley*, 1 Rep. in Ch., 110; *Harrison v. Foster*, 9 Alab., 955.

³ *Smith v. Barham*, 2 Dev. Eq., 420. 428; *Covenhoven v. Shuler*, 2 Paige, 122; *Randall v. Russell*, 3 Meriv., 193; *Preston on Leg.*, 96; *Roper on Leg.*, 9; *Henderson v. Vaulx*, 10 Yerg., 30; *Cairns v. Chaubert*, 9 Paige, 160.

his expressions in making the bequest. If it be clearly his intention that the legatee for life shall have the actual use and enjoyment of the things bequeathed, and the remainderman shall take them subject to such deterioration as they may receive while in the hands of the first taker, there can be no ground for refusing him possession, &c., whether the bequest be *general* or *specific*.¹

Whether a gift for life of specific articles which must be consumed in their use, such as hay, grain, firewood, wines, &c., is to be considered an absolute gift of the property, or whether they must be sold, the proceeds invested, and interest only be paid to the tenant for life, has been a question of much difficulty,² and is said not to be fully settled in England. Williams, in his work on Executors,³ lays down the rule thus: "A gift for life of things *quæ ipso usu consumuntur*, as corn, wine, *if specific*, is an absolute gift of the property; but, if *residuary*, the thing must be sold, and the interest of the produce paid to the legatee for life."³ It has, also, been held, that the intention of the testator, that the first taker should enjoy the bequest even to the *exclusion* of those in remainder, might be inferred from the *nature of the property* bequeathed, as of *hay, corn, wines* and such articles, where the consumption is inseparable from the use. That, where

¹ Dunbar v. Woodcock, 10 Leigh, 628; Evans v. Inglehart, 6 Gill. & Johns., 171; Holman's Appeal, 12 Harris, 178; Harrison v. Foster, 9 Alab., 955.

² Porter v. Tournay, 3 Ves., 314; Randall v. Russell, 3 Meriv., 194.

³ Page 1259.

this is the case, the right of those in remainder will be limited to such portions of the bequest as may remain unconsumed at the death of the legatee for life, or may even fail altogether, as repugnant to the primary purposes of the gift.¹

As the question of conversion is one of intention on the part of the testator, it follows that where there is a *positive direction* in the will for a trustee to convert the personal estate into money, and to invest in government or real securities, and the trusts of the investment are declared for the benefit of one for life, with remainder over; the legatee for life is entitled to receive the amount only of so much of the income as would have arisen from the personal estate if converted and invested according to the trust, within a year after the testator's death; and the trustees will not be allowed any greater payment to him in passing their accounts;² and, as the testator directed his personal estate to be *converted into money and invested*, it follows that *every part of the personal estate* is to be converted for investment, except that, which, according to the rules of court, is deemed to be properly invested. In the case of *Howe v. The Earl of Dartmouth*,³ Lord Eldon held, that, although bank stock might be as safe as any government security, and he

¹ *Henderson v. Vaulx*, 10 Yerg., 30; *State v. Warrington*, 4 Harrington, 55; *Randall v. Russell*, 3 Mer., 194; *Holman's Appeal*, 12 Harris, 178; *Tyson v. Blake*, 22 N. Y. Rep., 558; *Wright v. Miller*, 8 N. Y. Rep., 25; *Shaw v. Huzzy*, 41 Maine, 495.

² *Hill on Trustees*, 387; *Dimes v. Scott*, 4 Russ., 195.

³ *Howe v. The Earl of Dartmouth*, 7 Ves., 137; see S. C., 2 Leading Cases in Equity, 274.

believed it was, yet it was not government security ; and, therefore, the court did not *lay out*, or *leave*, the property in bank stock. And what the court would do, it expected from trustees and executors. As to bank stocks, he said, the court had ordered *four per cents.* and *five per cents.* to be sold and converted into *three per cents.* upon this ground, that, however *likely or not*, that they may be redeemed, the court looks at them as a fund that is not permanent, though it may remain forever ; and considers, that from *that* quality there is an advantage to the present holder, who gets *more interest because* they are liable to be redeemed." Such being the view taken by the court, if a trustee or executor, where there is *positive directions* in the will to convert the personal estate into money for investment, permits an unauthorized security, producing a much higher rate of interest—as, for instance, an Indian security producing ten per cent.—to remain undisposed of for the benefit of the tenant for life, and pays to such tenant the whole income of the ten per cent., he will be held liable to make good to the remainderman the difference between the annual amount *actually* paid, and that which, according to the foregoing rule, ought to have been paid by him to the tenant for life, which, in the case supposed, would be the difference between *ten per cent.* and *three per cent.*¹ But this would not probably be the rule where there were no *directions* given by the

¹ *Dimes v. Scott*, 4 Russ., 195; *Mills v. Mills*, 7 Sim., 509; *Howe v. Earl of Dartmouth*, 7 Ves., 150; *Price v. Anderson*, 15 Sim., 479.

testator to the executor or trustee to convert the personal estate,¹ and especially would it not be the rule in a case where the bequest was in its nature *specific*. Thus, in *Lord v. Godfrey*,² the testator bequeathed the residue of the stocks and funds then, or at his decease standing in his name, after payment of his debts, to trustees, to pay the interest and dividends to his wife for life, with remainder to C. L.; and empowered his trustees, at their discretion, to change the stock as often as to them should seem fit and proper. At the testator's death there were Long Annuities standing in his name producing £365 per annum. Sir J. Leach, Vice Chancellor, held, that the widow was entitled to enjoy the Long Annuities in specie. "It would, I think," said his Honor, "be too much to intend that the testator meant to authorize the trustees, at their pleasure, to diminish the gift he had before made to his wife. Such a power is given to the trustees with a view to the security of the property, and not with a view to vary or affect the relative rights of the legatees."² More recently the court have been inclined to lean against the doctrine of conversion, strongly as is consistent with the supposition that the rule is well founded.³ Hare and Wallace, in their notes to the case of *Howe v. Earl*

¹ *Prendergast v. Prendergast*, 3 House Lords Ca., 195; *Meyer v. Simmson*, 21 Law. J. Ch., 678; and see *Williamson v. Williamson*, 6 Paige 303.

² *Lord v. Godfrey*, 4 Mad., 455; *Bethume v. Kennedy*, 1 My. & Cr., 114; *Evans v. Jones*, 2 Coll., 516; *Marshall v. Bremner*, 2 Sm. & G., 237; *Mills v. Brown*, 21 Beav., 1; *Fielding v. Preston*, 5 W. R., 851.

³ *Hinves v. Hinves*, 3 Hare, 611; *Mackie v. Mackie*, 5 Hare, 70, 77; *Alcock v. Sloper*, 2 My. & K., 699; *Daniel v. Warren*. 2 Y. & C., 290.

of Dartmouth,¹ state very concisely the American doctrine on the subject of the relative rights of the tenant for life and remainderman in these cases. They say, "the general principle followed in *Howe v. Earl of Dartmouth*, that, in adjusting the respective interests of legatees for life and remaindermen in bequests of personalty, it will be presumed that the testator intended that the bequest should be continuous, and that it should not be consumed in the hands of the first taker, but should survive for the benefit of those in remainder, has been adopted by the courts of this country, although the instances requiring its application are much fewer with us than in England. It is well settled that where there is a *pecuniary* or *residuary* bequest for life, with a limitation over, the executor will be bound to protect the interests of those in remainder, by requiring security from the legatee for life, or by converting the fund into cash and investing it, in trust, for the benefit of all who are entitled under the will.² This general rule, which is simply designed to give effect to the intention of the testator, will, however, yield wholly or in part wherever he manifests an opposite or different intention; or where it can be applied without defeating the purposes of the bequest. When money, or property meant to be converted into money, is bequeathed,

¹ 2 Leading Cases in Equity, 284.

² *Covenhoven v. Shuler*, 2 Paige, 132; *Williamson v. Williamson*, 6 Paige, 298; *Kinnard v. Kinnard*, 5 Watts, 108; *Eeschelburger v. Barnetz*, 17 S. & R., 293; *Woods v. Sullivan*, 1 Swan, 507; *Wootten v. Burch*, 2 Md. Ch., 190.

there is no hardship in requiring security before payment or delivery to the legatee for life, because if he is unable to give security, the object of the testator may be equally well attained by investing the fund, and allowing him to receive the interest. But where *books, furniture*, or other specific chattels are specifically bequeathed by will, the presumption is that the testator intended they should be used by the legatee in the form in which they were given; and, as they must be delivered to him in specie in order to effectuate this intention, security will not be required, because it would defeat the bequest in case the legatee were unable to give it. Hence, under these circumstances, the duty of the executor is limited to taking an inventory of the legatee for life, without security, and subject to such deterioration or consumption as may result from an appropriate use which he may make of it.¹ But, the presumption of equity is strongly against a course, which necessarily interferes with the equalization of the bequest between the legatee for life and those in remainder, by compelling the latter to take the property subject to the deterioration which it has undergone by the lapse of time and use, that where specific chattels, instead of being given specifically, form a part of a general residuary bequest for life, with limitations over, the object of the testator will be presumed to have been

¹ *Woods v. Sullivan*, 1 Swan, 507; *Wootten v. Burch*, 2 Md. Ch., 190; *Raney v. Heath*, 2 Heath & Patton, 206; *Henderson v. Vaulx*, 10 Yerg., 30; *Spear v. Tinkum*, 2 Barb. Ch., 211; *Smith v. Barham*, 2 Dev. Eq., 420; *Holman's Appeal*, 12 Harris, 174; *German v. German*, 3 Casey, 116.

to give the first taker the mere interest on the fund; and the executor will be bound to convert the whole into cash, and either invest it for the purposes of the will, or pay it over on receiving security, as in the case of a *pecuniary* legacy.”¹

Out of this doctrine of conversion arises other questions, as to the time *when* the interest is to commence; *what* interest is to be allowed, and *when* to be paid. Where a testator directs his residuary estate to be converted and invested in a particular manner, the tenant for life is entitled, from the first year after the testator's death, to receive the amount of income which those investments would have produced if made at the time.² But the more difficult question is, what interest shall the tenant for life take *during the first year after the testator's death*? Upon this question there has been much diversity.

As the assent of an executor to a legacy is necessary, he cannot be compelled to pay it, until a sufficient time has elapsed to enable him to examine the situation of the testator's estate. By the civil law he was allowed a year from the death of the testator, during which time it was presumed he might fully inform himself of the state of the testator's property. The same period has been generally adopted in the English and American courts, where there are no statutes of distribution directing otherwise; and such, likewise, is the usual period fixed

¹ *Smith v. Barham*, 2 Dev. Eq., 420, 428; *Covenhoven v. Shuler*, 2 Paige, 122.

² *Dimes v. Scott*, 4 Russ., 195; *Howe v. The Earl of Dartmouth*, 7 Ves., 151.

upon by statutes of distribution.¹ As a general rule, interest is payable on legacies from the time when they actually become due; and, as general legacies, where there are no directions in the will fixing their time of payment, are not due until one year after the death of the testator, interest will be computed from that time.² According to this principle, it has been held, that the tenant for life may be entitled to nothing until the expiration of a year from the death of the testator,³ and in the case of *Robinson v. Robinson*,⁴ it was held, that where trustees had an option to vest in the three per. cents., or on real security, which they neglected to do, the tenant for life was entitled to interest from the end of one year after the death of the testator, at *four*

¹ *Wood v. Penoyre*, 13 Ves., 333, 334; *Pearson v. Pearson*, 1 Sch. & Lefr., 11; *Williams on Executors*, 1250; *Eyre v. Golding*, 5 Binn. Rep., 475; *Betzer v. Hahn*, 14 S. & R., 238; *Miles v. Wister*, 5 Binn. Rep., 472; *Miller v. Philip*, 5 Paige Rep., 573; *Kingsland v. Betts*, 1 Edw. Ch., 596; *Hoyt v. Hilton*, 2 Edw. Ch., 202; *Marr v. McCullough*, 6 Porter, 507; *Hilyard's Estate*, 5 W. & S., 31; *Brown v. Cattell*, 1 Desan., 112; *Bowles v. Drayton*, 1 Desan., 489; *Jacobs v. Bull*, 1 Watts, 372; *Hassanclever v. Tucker*, 2 Binn., 525; *Moffat v. Burnie*, 16 Beav., 298; *Atlee v. Hook*, 23 Law J. Ch., 776, V. C. Stuart; *Booth v. Ammerman*, 4 Brad., 132, 133; N. Y. Rev. St., vol. iii., p. 177. sec. 48, 5th ed.

² *Child v. Elsworthy*, 2 DeG., Mac. & G., 679; *Wood v. Penoyre*, 13 Ves., 333; *Gibson v. Bott*, 7 Ves., 96; *Pearson v. Pearson*, 1 S. & L., 10; *Collyer v. Ashburner*, 2 DeG. & Sm., 404; see also *Garthshore v. Charlie*, 10 Ves., 13; *Marsh v. Hagne*, 1 Edw. Ch., 174; *Booth v. Ammerman*, 4 Brad., 132; *Williamson v. Williamson*, 6 Paige, 298; *Burtis v. Dodge*, 1 Barb. Ch., 77; *Smith v. Lambert*, 30 Maine, 137.

³ *Scott v. Hallingworth*, 3 Mad., 161; *Vickers v. Scott*, 3 M. & K., 500; *Taylor v. Hibbert*, 1 J. & W., 308; *Tucker v. Boswell*, 5 Beav., 607; see also *Sitewell v. Barnard*, 6 Ves., 522. But this rule has been questioned as applicable to legatees for life generally, see *Augustine v. Martin*, T. & R., 238, and *Hewitt v. Morris*, T. & R., 244.

⁴ *Robinson v. Robinson*, 21 Law J. Ch., 111.

per cent. on the money the property would have produced from the end of that year up to the time of the investment in the three per cents.

Where the subject matter of the bequest is such that it does not require to be converted, as where it is already properly invested in the funds, no time is required for conversion or investment, and there would appear to be no valid reason why the tenant for life should not have the enjoyment of the use, or the income, from the death of the testator. Thus, it has been held that where the bequest is a life estate in a residuary fund, where no time is prescribed in the will for the commencement of the interest, or the enjoyment of the use or income of such residue, the legatee for life is entitled to the interest or income of the clear residue, as afterwards ascertained, to be computed *from the death of the testator*.¹ In the case of *La Terriere*,¹ Sir A. Hart, Vice Chancellor, laid down the rule, that the *cestui que trust* for life, *during the first year after the testator's death, was entitled to the income* of such parts of the estate as are properly invested at the death of the testator, or may become so invested during the year.

Upon the principle that interest is to be computed from the time the legacy becomes due, where the legacy becomes due upon the happening of a certain contingency, interest will be computed from

¹ *Williamson v. Williamson*, 6 Paige, 304; *La Terriere v. Bulmer*, 2 Sim., 18; see also *Gibson v. Bott*, 7 Ves., 95; *Hewitt v. Morris*, T. & R., 244; see also Sir J. Wigram, in *Taylor v. Clark*, 1 Hare, 173, 174.

the date of such contingency.¹ There would seem to be an exception to this general rule, that legacies are not to draw interest until, by the terms of the will, etc., they become due. The exception is where a legacy is left by a parent, or one in *loco parentis*, to an infant, without making other suitable provision for its support. In such case, whether the legacy be vested or contingent, interest on the legacy as maintenance will be allowed from the death of the testator.² Upon a similar principle, a legacy given to the widow, in lieu of dower, no other maintenance being provided for her, is due immediately on the death of her husband.³

In England it is the settled doctrine, that any *extraordinary* additions to the usual annual income of stock or other property, settled in trust, upon one for life, with remainder over, must be treated as capital, and added to the principal fund.⁴ But where the addition to the annual income is not *extraordinary*, or such as might not have been reasonably anticipated by the testator, it will be given to the tenant for life. Thus, where an insurance

¹ *Coventry v. Higgins*, 14 Sim., 30; *Booth v. Ammerman*, 4 Brad., 135; *Pickwick v. Gibbs*, 1 Beav., 271; *Berdsall v. Hewlett*, 1 Paige, 32.

² *Acherly v. Wheeler*, 1 P. Wms., 783; *Hill v. Hill*, 1 V. & B., 183; *Mills v. Robarts*, 1 Russ. & My., 555; *Chambers v. Godwin*, 11 Ves., 2; *Brown v. Temperly*, 3 Russ., 263; *Lupton v. Lupton*, 2 Johns. Ch., 614; *Van Bramer v. Hoffman*, 2 Johns. Ch., 200.

³ *Williamson v. Williamson*, 6 Paige, 298. But the fact that a *general* legacy of bank stock is made to a widow in lieu of dower, will not give her the income of such stock from the time of the death of the testator until its transfer to her: otherwise had the bequest been *specific*. *Tift v. Porter*, 8 N. Y. Rep., 516.

⁴ *Brander v. Brander*, 4 Ves., 800; *Paris v. Paris*, 10 Ves., 185; *Hooper v. Rossister*, 13 Price, 774; S. C., 1 McClel., 527.

company had declared for several years, yearly dividends of two and one-half per cent., but in 1846 declared a dividend of *ten* per cent. in addition, it was held that the tenant for life of the stock, was entitled to the whole amount.¹ The principle is not so well defined as to make its application, in all cases, easy; the trustee, therefore, would do well to take the advice of the court, in cases where the increase over the annual income is considerable, before paying it over to the beneficial tenant for life; for should he pay over to him such extraordinary *bonus* when he ought to have invested it for the benefit of all parties, he will be held answerable to those in remainder. The general rule, however, in such cases is, that the tenant for life is entitled to increase and profits.²

A bequest of the income of shares in a corporation, to the testator's widow, for life, for her own support and the education of her children, is held to include a dividend declared on such shares, after her death, which dividend, however, was declared for a period which expired before her death.³

Where real estate is settled in trust for a tenant for life, with remainder over, and there is an incumbrance on the whole estate, it is the duty of the life tenant to keep down the interest, during the continuance of his estate, and the owner of the future

¹ Price *v.* Anderson, 15 Sim., 473; see also Johnson *v.* Johnson, 15 Jur., 714; Murray *v.* Glass, 17 Jur., 816; 23 Law J. Ch., 126.

² Ware *v.* McCandlish, 11 Leigh, 599; Cogswell *v.* Cogswell, 2 Edw. Ch., 231.

³ Johnson, Ex'or, &c., *v.* Bridgewater Iron Manufacturing Company, 14 Gray, 276; Ellis *v.* Essex Merrimack Bridge, 2 Pick., 248.

estate is to pay off the principal of the lien.¹ Such is the supposed intention of the testator, in the absence of any particular direction upon that subject. But where it appears from his directions in the will, that he intended the life tenant to enjoy the *clear* income of the property during the continuance of her estate, and to have the interest paid from other funds of the remaindermen, such intention will govern.² So, also, where real estate is settled in trust for a life tenant with remainders over, the expense of keeping the mansion house in substantial repair must be defrayed out of the interest of the tenant for life, and the trustee will not be justified in raising it out of the *corpus* of the estate.³ But in a case where the executors held the residuary real and personal property in trust for a contingent remainderman in fee, with remainder over, on failure of the contingency, and two parcels of the land in trust for A. for life, it was held, that the executors could not, in the absence of any express power, apply the residuary personal property to the improvement of the one parcel which remained in the same condition as when devised; but

¹ 4 Kent's Com., 74; *Moseley v. Marshall*, 22 N. Y. Rep., 202; *House v. House*, 10 Paige, 158; *Morley v. Morley*, 35 Eng. L. and Eq. Rep., 220; Lord Hardwick in *Casbourne v. Scarfe*, 1 Atk., 606; *Tracy v. Herford*, 2 Bro., 128; *Jones v. Sherrard*, 2 Dev. & Batt. Eq., 187; *Hinves v. Hinves*, 3 Hare, 609; 1 Washburn on Real Prop., 80, 96, 573; *Swaine v. Perine*, 5 Johns. Ch., 482; Story's Eq. Jur., sec. 487.

² *Moseley v. Marshall*, 22 N. Y. Rep., 202.

³ *Bostock v. Blackomy*, 2 Bro. C. C., 653; *Hibbert v. Cook*, 1 Sim. & St., 552; *Nairn v. Majoribanks*, 3 Russ., 582; *Caldecott v. Brown*, 2 Hare, 144; *Jones v. Dawson*, 19 Alab., 672; *Martin's Appeal*, 23 Penn. St. Rep., 438.

the other parcel, in consequence of a municipal improvement, had become capable of being leased for a permanent term at a high rent, if warehouses were erected thereon, and the court directed or permitted the executors to apply the *residuary personal* property to the erection of warehouses on the land, charging the tenant for life with the interest on the investment, a reasonable allowance for the depreciation of the buildings, for taxes and insurance, by way of deduction from the rents.¹ So, also, where trustees were directed to invest in real estate, and purchase a house, it was said that the expense of putting it in tenantable repair should come from the *corpus* of the fund.² So, also, where the tenant for life was compelled to make good certain dilapidations, incurred by the testator under a covenant in the lease, it was held that the expenses were to be charged on the *corpus* of the estate.³ In the last case, the bequest was specific. The general rule is, that a tenant for life, making permanent improvements on the estate, will not be allowed compensation as against the remaindermen.⁴

It is also a rule that the tenant for life, in possession of the trust estate, is liable for all *rates* and *taxes*.⁵

¹ Cogswell v. Cogswell, 2 Edw. Ch. Rep., 231.

² Parsons v. Winslow, 16 Mass., 361.

³ Harris v. Pryner, 1 Drew, 174.

⁴ Corbett v. Lawrens, 5 Rich Eq., 301.

⁵ Fountaine v. Pellet, 1 Ves., Jr., 342; Cairns v. Chabert, 3 Edw. Ch., 312; Jones v. Dawson, 19 Alab., 672; Tupper v. Fuller, 7 Rich Eq., 170; McMillen v. Robbins, 5 Ham., (Ohio,) 28; 1 Washburn on Real Prop., 97.

SECTION IV. LIABILITY OF TRUSTEES AND GUARDIANS OF MINORS.

Infants and their property are peculiarly under the supervision and protection of the Court of Chancery, which is exceeding jealous of their rights and interests. This court possesses an *inherent* jurisdiction which extends to the care of their persons so far as is necessary for their protection and education; and, also, to the care of their property both real and personal, for its due management and preservation, and proper application for their maintenance.¹

If the father is not able to maintain his children, the court, on application, will order maintenance out of their own estate; and this inability need not depend upon insolvency, but an inability from limited means, to give to his child such an education as its fortune, possessed or expected, demands. And such maintenance will be directed although the devise or settlement under which the property is held contains no direction for maintenance, and even though it direct an accumulation.² But it must be understood that this original and inherent jurisdiction of a Court of Chancery, respecting the control and management of the infants' property, relates only to their *personal property* and the *income* of their real estate. The court has no *inherent* power to direct a sale of their real property

¹ Williamson v. Berry, 8 How., 495, 531.

² Buckworth v. Buckworth, 1 Cox. 80; Jervis v. Silk, Coop., 52; also Williamson v. Berry, 8 How., 495, 531.

for their maintenance or education, and can only do so when authorized by the Legislature.¹

Chancery deals with the estate of an infant in the manner best suited for its advantage, and without being tied down by any rules so inflexible as not to yield to its good where it is the only party in interest. It will, sometimes, refuse an allowance for its support, even out of the interest or income of its estate, where it is small and that of its father is ample; and will require the father to discharge the natural duty of supporting and educating his child, which the law casts upon him *prima facie*, and will not excuse him from doing without sufficient cause.² But, on the other hand, where the fortune of the child is large, and that of its father is inadequate for its proper support and education, a suitable allowance will be made out of the income of its estate.³

Where the necessities of the infant require it, the court will provide for its immediate wants, if need be, out of the principal fund.⁴ But Equity

¹ *Williamson v. Berry*, 8 How., 495, &c.; see also *Clark v. Van Surlay*, 15 Wend., 436, and *Cochran v. Van Surlay*, 20 Wend., 365; *Grignon's Lessee v. Astor*, 2 Howard, 319; *Roggers v. Dill*, 6 Hill, 415.

² 3 *Leading Cases in Equity*, 265, 3d Am. ed.; in *matter of Kane*, 2 Barb. Ch., 375; *Cruger v. Hayward*, 2 Desau., 94; *Sparhawk v. Buel*, 9 Vt., 41; *Addison v. Bowie*, 2 Bland., 606; *Myres v. Myres*, 2 McCord's Ch., 214; *Dupont v. Johnson*, 1 Bail. Eq., 279; *Spear v. Spear*, 9 Rich Eq., 188.

³ *Rice v. Townele*, 4 Sand. Ch., 568; *Wilkes v. Rogers*, 6 Johns., 566; *Heyward v. Cuthbert*, 4 Desau., 445; in *matter of Burke*, 4 Sandf. Ch., 617.

⁴ *Williams' Case*, 3 Bland., 186; *Barlow v. Grant*, 1 Vern., 255; *ex parte Allen*, 3 DeG. & Sm., 485; *Long v. Norcom*, 2 Ired. Eq., 354; *Withers v. Hickman*, 6 B. Monr., 293; *matter of Bostwick*, 4 Johns. Ch., 100; *ex parte Hays*, 13 Jur., 762; *ex parte Knott*, 1 R. & M., 499; *Franklin v. Green*, 2 Vern., 137; *Nunn v. Harvey*, 2 DeG. & Sm., 301.

cannot make an allowance out of the principal fund where there is a limitation over, in case of the infant's death, to a third person. Although the court, in extreme cases, might make such an allowance where the limitation over was to the survivors of the original donees.¹

The general rule, and one from which it will seldom do to depart without leave from the court, is, that trustees and guardians can only apply the *income* of the infant's estate to his maintenance and support.² For, if they transgress the strict line of their duty by applying the capital of the fund, or any part of it, to the maintenance or advancement of the infant on their *own* authority, they will be liable to be decreed to pay the whole amount of the fund without any deduction, to the infant or its assignee upon its coming of age, notwithstanding they have acted in good faith, and for the benefit of the infant; for the law deems such payments ought to be discouraged.³ There are instances where a payment out of the capital of an infant's fortune by trustees has been allowed to them, although

¹ In the matter of Davison, 6 Paige, 136; in matter of Ryder, 11 Paige, 185; Miles v. Wistar, 5 Binn., 477.

² Davis v. Harkness, 1 Gilm., 173; Prince v. Logan, Spears' Eq., 29; Frelick v. Turner, 26 Miss., 393; Martin's Appeal, 23 Penn St. Rep., 438; McDowell v. Caldwell, 2 McCord's Ch., 43; Hester v. Wilkinson, 6 Hump., 219; Villard v. Chovin, 2 Strob. Eq., 40; Haigood v. Wells, 1 Hill's Eq., 59; Carter v. Rolland, 11 Hump., 339; 3 Leading Cases in Equity, 266.

³ Davis v. Austin, 3 Bro. C. C., 178; Lee v. Brown, 4 Ves., 362; Walker v. Wetherell, 6 Ves., 473; Hill on Trustees, 399; Villard v. Chovin, 2 Strob. Eq., 40; McDowell v. Caldwell, 2 McCord's Ch., 43; Davis v. Roberts, 1 Smede's & Mar. Ch., 543; Myres v. Wade, 6 Randolph, 444; Davis v. Harkness, 1 Gilm., 173.

made upon *their own* authority, as where made for actual necessities for the infant's use.¹

It is the duty of the trustee or guardian, whenever occasion requires that he should expend any portion of the capital of the infant's fund for his maintenance and support, to apply to the court for permission and direction in the premises. But where the nature of the case, or the want of a proper tribunal competent to direct the course and amount of expenditure, has prevented such application, it will be excused, and the account will be confirmed when subsequently presented;² and it has been held that a guardian will always obtain an allowance for expenditures made out of principal, whenever he can make out such a case of necessity as would have precluded all question as to the proper course, had the question been brought before the court by a request for directions.³

Where the trust fund is given over for the benefit of another person in case of the death of the infant under twenty-one, no part of the capital can be applied for the infant's advancement unless there is an express power to do so created by the

¹ *Davis v. Austin*, 3 Bro. C. C., 178; *Long v. Norcom*, 2 Ired. Eq., 354; *Sparhawk v. Buell*, 9 Vt., 41; *Withers v. Hickman*, 6 B. Monr., 293; in matter of *Bostwick*, 4 Johns. Ch. 100.

² *Long v. Norcom*, 2 Ired. Eq., 354; *Sparhawk v. Buell*, 9 Vt., 41; *Withers v. Hickman*, 6 B. Monr., 293.

³ In matter of *Bostwick*, 4 Johns. Ch., 100; 3 *Leading Cases in Equity*, 267; *Long v. Norcom*, 2 Ired. Eq., 354; *Villard v. Chovin*, 2 Strob. Eq., 40; *Lee v. Brown*, 4 Ves., 369; *Sisson v. Shaw*, 19 Ves., 288; *Maberly v. Turton*, 14 Ves., 499; *Barlow v. Grant*, 1 Vern., 255; *Franklin v. Green*, 2 Vern., 137; 1 *Roper on Legacies*, 768, and 2 *Williams' Ex'ors*, 869.

trust instrument.¹ In such cases, there is no power to appropriate any part of the capital, unless those who are or may be entitled in remainder, being competent, appear and give their consent.²

The trustee cannot safely apply the income of the infant's fortune for his maintenance or benefit, unless he has the authority of the trust instrument, or the sanction of the court; and although the trust instrument may authorize an appropriation for the maintenance of the infant, yet if it leaves the amount uncertain, the trustee will find it more prudent to apply to the court to determine the amount to be appropriated for that purpose.³ And where the trustee is authorized to appropriate any portion of the income to the maintenance and support of the infant, he may either make the application himself, or he may pay it into the hands of the guardian or parent. But in the exercise of his discretion he is not to place the funds directly in the hands of the beneficiary who, from his mental or moral condition, is incapable of using it beneficially to himself.⁴

It has already been remarked that equity could not make an allowance out of the principal fund,

¹ *Lee v. Brown*, 4 Ves., 369; *Van Vechten v. Van Vechten*, 8 Paige, 104.

² *Evans v. Massey*, 1 Y. & J., 196; *Hill on Trustees*, 400; see also *Erratt v. Barlow*, 14 Ves., 202; *Turner v. Turner*, 4 Sim., 430; *Cannings v. Flower*, 7 Sim., 523; *Bradley v. Amidon*, 10 Paige, 235.

³ *Roper on Legacies*, 768; *Williams on Executors*, 868; *Owens v. Walker*, 2 Strob. Eq., 280; *ex parte Williams*, 2 Coll. Ch., 740; *Andrews v. Partington*. 3 Bro. C. C., 60; *Bridge v. Brown*, 2 N. C. C., 187; *Cotham v. West*, 1 Beav., 381.

⁴ *Mason v. Jones*, 2 Barb. Ch. 248; *Gott v. Cook*, 7 Paige, 538; see also *Van Vechten v. Van Vechten*, 8 Paige, 104.

where, in case of the death of the infant, there was a limitation over to a third person. But this has been done where the gift proceeded from the *parent*, or one standing in *loco parentis*, and the subject of the trust was a *residuary* personal estate, and the property was given over to other children on the death of the infant under twenty-one, when the chances of survivorship were deemed equal.¹

In some of the States the Legislature have conferred upon the court express power to make allowances for the maintenance of infants. In New York it is enacted,² that "where rents and profits are directed to be accumulated for the benefit of infants entitled to the expectant estate, and such infants shall be destitute of other sufficient means of support and education, the Supreme Court, upon the application of their guardian, may direct a suitable sum out of such rents and profits to be applied to their maintenance and education." So, likewise, in Pennsylvania, the Legislature have, by enactment³ provided that notwithstanding any direction to accumulate rents, issues, and profits for the benefit of any minor or minors, the court may, on application of their guardian, where there shall be no other means for maintenance and education, decree an adequate allowance for such purpose, making an

¹ *Green v. Ekins*, 2 Atk., 476; *Bullock v. Stones*, 2 Ves., 521; *Newport v. Cook*, 2 Ashm., 332; *Seibert's Appeal*, 19 Penn. St. Rep., 49; *Fairman v. Green*, 10 Ves., 48; *ex parte Kebble*, 11 Ves., 604; *Turner v. Turner*, 4 Sim., 434; see also *Matter of Ryder*, 11 Paige, 185; *Leake v. Robinson*, 2 Mer., 384.

² 1 Rev. Stat., 726, sec. 39.

³ Act of April 18, 1853.

equal distribution among those who have equal interests. Statutes of this character were enacted because of a question which existed as to the propriety of the exercise of such a power by the court unauthorized by legislative enactment. Courts, however, in extreme cases, have exercised a similar power.¹

If the father of the infant be alive, and able to support his child, he is by law bound to do so; and the trustee would not be justified in applying the income of the infant's estate for his maintenance, even though the trust instrument should contain a general power for maintenance.² But this does not apply to a step-father, who is under no such legal obligation to support his step-child,³ but an allowance for maintenance and education of his ward, was refused to a step-father, although she had lived with him; it appearing that he had expended nothing otherwise for her.⁴ Nither will this doctrine be applied in a case where, by the marriage settlement of the parents, a *positive* trust for the application of the children's income to their maintenance and education, has been created.⁵ But if the trust

¹ *Greenwell v. Greenwell*, 5 Ves., 194; *Collis v. Blackburn*, 9 Ves., 470; *Fairman v. Green*, 10 Ves., 45; *McDermot v. Kealy*, 3 Russ., 264; *Stretch v. Watkins* 1 Mad., 253; *Corbin v. Wilson*, 2 Ashm., 208; *Newport v. Cook*, 2 Ashm., 342.

² *Matter of Kane*, 2 Barb. Ch., 375; *Bethea v. McCall*, 5 Alab., 312; *Chaplin v. Moore*, 7 B. Monr., 173; *Sparhawk v. Buel*, 9 Vt., 41; *Cruger v. Heyward*, 2 Desau., 94; *Dupont v. Johnson*, 1 Bail. Eq., 279.

³ *Gay v. Ballou*, 4 Wend., 403; *Freto v. Brown*, 4 Mass., 675.

⁴ *Booth v. Sineath*, 2 Strob. Eq., 31.

⁵ *Munday v. Lord Howe*, 4 Bro. C. C., 223; *Stocken v. Stocken*, 4 Sim., 152; *Meacher v. Young*, 2 M. & K., 490.

thus created is only *discretionary* and not *positive*, the father cannot compel the trustees to exercise this power in exoneration of his own liability.¹

The mother is not under a legal obligation to maintain her children; consequently the rule is not applicable where the father is dead, or is unable to support his children, although the mother may be alive and able.² This last point however, has been questioned.³

Where the interest of the children's fund is expressly given to the father, for their maintenance, it is, in fact, a gift *pro tanto* for the benefit of the father. Thus, where the interest of legacies given to the parent, or the rents and proceeds of shares of minor children are directed to be paid to the parent "for" or "toward" their respective maintenance and education, although with a direction that in case of death under twenty-one, the shares of each, with accumulations, if any, shall go over to the survivors, the father having maintained the children is entitled to the proceeds without an account.⁴ But the income will be directed to be applied to the support and maintenance of the children notwithstanding the bankruptcy of the parent.⁵

¹ Thompson v. Griffen, Cr. & Ph., 322.

² In Matter of Bostwick, 4 Johns. Ch., 100; Dawes v. Howard, 4 Mass., 97; Whipple v. Dow, 2 Mass., 415; Heyward v. Cuthbert, 4 Desau., 445; Douglass v. Andrews, 12 Beav., 310; Bruin v. Knott, 1 Phil., 573; Ander-ton v. Yates, 5 DeG. & Sm., 202.

³ Billingsby v. Critchett, 1 Bro. C. C., 268; Hawley v. Bannister, 4 Mad., 275, 280; but see Smee v. Martin, Bunb., 131.

⁴ Brown v. Paull, 1 Sim., N. S., 92; Hadow v. Hadow, 9 Sim., 438; Rainsford v. Rainsford, Rice's Eq., 343.

⁵ Dalton's Settlement, 1 DeG., Mac. & G., 265

SECTION V. TRUSTEES OF MARRIED WOMEN, THEIR DUTIES AND LIABILITIES IN RESPECT THERETO.

At common law, "a feme covert cannot in any way be sued even for necessaries. Neither can she bind herself or her husband by specialty. And, although living with him, and not allowed necessities, or apart from him, whether on an *insufficient* or an *unpaid* allowance, she may so far bind him, that those who furnish her with articles of subsistence may sue him; yet, even in respect to these, she herself is free from all suit. Such is her position of disability, or immunity at law. Her separate existence is not contemplated; it is merged by the coverture in that of her husband; and she is no more recognized than is the *cestui que trust* of the mortgagor; the legal estate, which is the only interest the law recognizes, being in others. But in equity, the case is wholly different. Her separate existence, both as regards her liability and her rights, is here abundantly acknowledged: not, indeed, that her *person* can be made liable, but her property may, and it can be reached through a suit instituted against herself and trustee."¹

¹ Lord Brougham in *Murray v. Barlee*, 3 My. & K., 220, 222; see *Hulme v. Tenant*, 1 Bro. C. C., 16, and 2 Dick, 560, and 1 Lead. Ca. Eq., 394; *Peacock v. Monk*, 2 Ves., 190; *Allen v. Papworth*, 1 Ves., 163; *Fetliplace v. Gorges*, 1 Ves., 46, and S. C. 3 Bro. C. C., 8; *Rich v. Cockill*, 9 Ves., 359; *Wagstaff v. Smith*, 9 Ves., 520; *Thackwell v. Gardner*, 5 DeG. & Sm., 58; *Hodgson v. Hodgson*, 2 Kee, 704; *Humphry v. Richards*, 2 Jur., N. S., 432; *Sturgis v. Corp*, 13 Ves., 190; see also *Jacques v. The Methodist Episcopal Church*, 17 Johns., 548, 578, 579, 585; *Dyatt v. N. A. Coal Co.*, 20 Wend., 570, 573; *Powell v. Murray*, 2 Edw., 636, 643; 10 Barb., 597;

In many of the States, the doctrine as stated by Lord Brougham, that in equity, a *feme covert* has a separate existence both as regards her rights and her liabilities has also been acknowledged. In the case of *Jacques v. M. Ep. Ch.*,¹ Spencer, Ch. J., declared that the decisions fully established the doctrine "that a *feme covert*, with respect to her separate estate, is to be regarded in a Court of Equity, as a *feme sole*, and may dispose of her property without the consent or concurrence of her trustee, unless she is specially restrained by the instrument under which she acquires her separate estate: that the established rule in equity is, that where a *feme covert*, having separate property, enters into an agreement and sufficiently indicates her *intention to affect by it her separate estate*, a Court of Equity will apply it to the satisfaction of such an engagement." Platt, J., considered the rule to be, "that a *feme covert*, having a separate estate, is to be regarded as a *feme sole* as to her right of contracting for, and disposing of it. The *jus disponendi* is incident to her separate property and follows, of course, by implication. She may give it to whom she pleases, or charge it with the debts of her husband, provided no undue influence be exerted over

Wadham v. The Society, 2 Kernan, 415; *The A. Ins. Co. v. Bay*, 4 Com., 9; *Gibson v. Walker*, 20 N. Y. Rep., 479; *Imlay v. Huntington*, 20 Conn., 149; *Cook v. Husbands*, 11 Maryl., 492; *Harris v. Harris*, 7 Ired. Eq., 311; *Nixon v. Rore*, 12 Grat., 425; *Whitesides v. Carman*, 23 Mo., 457; also *Legond v. Garland*, ib., 547; *Ozly v. Ikelheimer*, 26 Alab., 382; *Bell v. Kellar*, 13 B. Monr., 381; *Lillard v. Turner*, 16 B. Monr., 374; *Burch v. Brackenridge*, 16 B. Monr., 482; *Wylly v. Collins*, 9 Geo., 223; *Roberts v. West*, 15 Geo., 123.

¹ *Jacques v. M. E. Church*, 17 Johns., 548 to 585.

her; and her disposition of it will be sanctioned and enforced by a Court of Equity, without the assent of her trustee, unless that assent be expressly made necessary by the instrument creating the trust. And the specification of any *particular mode* of exercising her disposing power, does not deprive her of any *other mode* of using that right, not expressly or by necessary construction negatived in the devise or deed of settlement." Mr. Justice Cowen also laid down the doctrine, "where the wife's separate estate is completely distinct and independent of her husband, she seems to be regarded in equity, as respects her power to dispose of or charge it with debts, to all intents and purposes as a *feme sole*, except in so far as she may be expressly limited in her powers by the instrument under which she takes her interest."¹

This rule which, in equity, considers a married woman, in respect to her separate estate, and her power to alien and charge it, as a *feme sole*, has been removed from one class of cases in New York, according to the construction given to their statute

¹ Dyett v. N. A. Coal Co., 20 Wend., 507, 573; Powell v. Murray, 2 Edw., 636; Wadham v. The Society, 2 Kern., 415; The Albany Ins. Co. v. Bay, 4 Coms., 9; Gibson v. Walker, 20 N. Y. Rep., 479. In New York, since the revised statutes, where real estate is settled to the separate use of a married woman, it is held that neither the *estate* nor the *rents* and *profits* can be charged for any debt or liability created or imposed upon it by her, because it is no longer *her estate*; that the whole estate is in the trustee, and her interests are inalienable. See Noyes v. Blakeman, 3 Sand. S. C., 531; same case, 2 Seld , 567; see also 1 R. S., 728, sec. 55, sub. 3, and 1 R. S., 729, sec. 60, and 1 R. S., 730, sec. 63, by which provisions the whole estate in law and equity is vested in the trustee, subject to the execution of the trust, and the beneficiary has no power to dispose of such interest. See also Yale v. Dederer and wife, 18 N. Y. Rep., 265.

of uses and trusts, by the Court of Appeals. In the case of *Noyes v. Blakeman*,¹ Mrs. Blakeman and her husband, by their joint deed, conveyed to Belden the separate estate of Mrs. Blakeman in certain premises, in trust, to pay out of the rent, income and profits, *first*, the interest upon certain incumbrances on the trust property; *second*, the taxes and assessments on the same; *third*, all necessary expenses incurred in needful repairs on the premises, and *fourth*, to pay the remainder of such rents, income and profits to Mrs. Blakeman, upon her own separate receipt, notwithstanding her coverture, to the intent and purpose, that the same or any part thereof, might not be at the disposal of, or subject to the debts, liabilities or engagements of her husband, or any future husband she might have, but at her own sole and separate use and disposal, &c., with power to Mrs. B. to dispose of the premises by last will and testament, and in default of such appointment, giving farther directions in relation to the disposition of such income after her death.

After the execution of this deed of trust by Blakeman and wife to Belden, two suits were commenced against them by the executrix of the will of Robert Bogardus, deceased, to obtain satisfaction out of the separate estate of Mrs. Blakeman for professional services alleged to have been rendered by the testator on account of such separate estate. Subsequently another suit was commenced against

¹ *Noyes v. Blakeman*, 2 Seld., 567; *Yale v. Dederer and wife*, 18 N. Y. Rep., 265.

them, together with the trustee Belden, by a creditor of the husband, the object of which was to set aside the trust deed, and charge the debts of the husband upon his interest as tenant by the *curtesy initiate*, in the trust estate in the hands of Belden. Again, subsequently to this, Mr. Blakeman, having obtained a discharge from his debts under the United States Bankrupt law, his assignee in bankruptcy commenced a suit, in equity, in the Circuit Court of the United States, against Mr. and Mrs. Blakeman, and Belden the trustee, to set aside the conveyance to Belden as fraudulent, and to subject the interests of Mr. Blakeman in the lands to the payment of his debts.

The plaintiff Noyes was employed as solicitor and counsel for the defendants in the first two suits, by Mr. and Mrs. Blakeman, with the understanding that the defence was for the benefit of Mrs. Blakeman, and to protect her interest in the trust estate, and that the costs were to be paid out of the income of her separate estate. In the last two suits the plaintiff was employed by Mrs. Blakeman and Belden, with a similar understanding, and that Belden was not to be held to any personal responsibility.

In deciding this case, the court held that, by the deed of Blakeman and wife, to Belden, for the purposes therein specified, a valid trust was created under the statute,² for Mrs. Blakeman; and consequently that, according to the provisions of the

¹ 1 R. S., 728, sec. 55, sub. 3.

sixtieth section of the statute concerning uses and trusts, which are, "that every express trust, valid as such, in its creation, except as herein otherwise provided, shall vest the *whole estate in the trustees, in law and equity*, subject only to the execution of the trust. That the person for whose benefit the trust is created shall take *no interest or estate in the lands*, but may enforce the performance of the trust in equity ;"¹ and, also, the sixty-third section of the same act, which declares "that no person beneficially interested in a trust for the receipt of the rents and profits of land, can assign, or in any manner dispose of such interest," Mrs. Blakeman had no estate in the land whatever ; and, therefore, it was not to be treated as her *separate* estate ; that before Mrs. Blakeman received from the trustee the "rents" and "profits," she had no power of disposition of them. That she could create *no lien upon them without the co-operation of her trustee*. Therefore, in respect to the *first two suits*, in which the plaintiff was employed by Mr. and Mrs. Blakeman, the plaintiff could not recover for his services rendered, although with the understanding that the defence was for the benefit of Mrs. B., to protect her interest in the trust estate, and that the costs should be paid out of the income of the property. But, in respect to the *last two suits* in which the plaintiff was employed by Mrs. B. and the trustee, the plaintiff was entitled to recover, upon the principle that he was employed by the trustee,

¹ 1 R. S., 792, sec. 60.

whose duty it was to defend the trust estate against the creditors of Blakeman, and was entitled to be reimbursed in all his necessary expenses out of the estate.¹ The extent of the modifying influence of the statute concerning uses and trusts in New York, upon the subject of a married woman's *separate* estate in property, real or personal, would seem to be no more than this: Since the Revised Statutes, where lands have been conveyed to a *trustee to receive the rents and profits and pay them over to a married woman for her sole use during her life*, that during such life, the whole legal and equitable estate in the lands is vested in the trustee subject only to the execution of the trust; and that the *cestui que trust*, or *feme covert*, has no estate in such lands or their future income upon which she can create a lien or charge for any purpose whatever. But if the trustee, in the use of reasonable diligence in protecting the trust estate, necessarily incurs expense, he will have a lien upon it for such expense, although not provided for in the trust instrument; and, if necessary, he may charge such expense upon the future income of the estate.²

The rule as to the power of a *feme covert* to charge her separate estate for debts, &c., has been laid down

¹ *Hide v. Haywood*, 2 Atk., 126; *Balch v. Halsham*, 1 P. Wms., 455; *Caffrey v. Darbey*, 6 Ves., 497; *Worrall v. Hartford*, 8 Ves., 8; *Dawson v. Clark*, 18 Ves., 254; *Wilkinson v. Wilkinson*, 2 Sim. & Stu., 237.

² As to the *separate* estate of the wife in New York, see the act of April 7, 1848, "for the protection of the property of married women," and also the act of March 20, 1860, "concerning the rights and liabilities of husband and wife." See also *Snyder v. Snyder*, 3 Barb. Rep., 621; *Holmes v. Holmes*, 4 Barb., 298; *Taylor v. Porter*, 4 Hill, 140; *Vanderhuden v. Mallory*, 1 Coms., 452; see also *Yale v. Dederer and wife*, 18 N. Y. Rep., 265.

thus: "The separate estate of a *feme covert* is liable in equity for any debts contracted by herself or her agent, for the benefit of *that estate*, or for *her own benefit upon the credit of her separate estate*.¹ Under this rule it is held, that where creditors do not claim under any *charge* or *appointment*, made in pursuance of the instrument of settlement, they must show that the debt was contracted either *for the benefit of her separate estate*, or *for her own benefit upon the credit of the separate estate*; and, that a *general* debt made by a married woman having a separate estate, is not a charge upon that estate; and such estate is not chargeable upon any *implied* undertaking of hers² But a recent construction of the Revised Statutes limits the power of married women, in respect to separate trusts of real estate, more strictly than had before been contended for. Under those provisions it has been held that a *feme covert* not only cannot dispose of or charge her separate estate by anticipation in any manner; but that, as she cannot incur a personal debt, even the surplus income cannot be made liable for any obligation contracted by her after marriage, even for necessary repairs to the trust estate, without the authority of the trustee; and the trustee cannot charge the

¹ North American Coal Co. v. Dyett, 7 Paige, 9, 14, and S. C., 20 Wend., 570; Gardner v. Gardner, 7 Paige, 112, 116, S. C., 22 Wend., 528; Cumming et al v. Williamson et al, 1 Sand., 17, 25; Dieckerman v. Abrahams, 21 Barb., 551; Coon v. Brook, 21 Barb., 546; Yale v. Dederer, 18 N. Y. Rep., 265.

² Curtis v. Engel, 2 Sand., 287; Knowles v. McAnely, 10 Paige, 343, 346; see also Vanderheyden v. Mallory, 3 Barb. Ch., 10, and 1 Coms., 453; Yale v. Dederer, 21 Barb., 286; S. C., 18 N. Y. Rep., 265.

estate except so far as he is authorized to do so by the terms of the trust.¹

The rule in Kentucky seems to be, that a *feme covert* may charge personal property held for her separate use, by an oral or written agreement, which shows an expressed or implied intention so to charge it.² In the case of *Burch v. Breckenridge*,³ Simpson, J., in delivering the opinion of the court remarked, "As a general rule, a married woman cannot, according to the common law, contract as a *feme sole*, nor, as such, sue or be sued. That being the *legal* rule, Courts of Equity, acting in conformity with it, have held that the wife can not bind herself personally, nor bind her *separate* personal estate by her *general* personal engagements. If, therefore, the wife contracts debts generally, without doing any act indicating an intention specifically to charge her separate estate with the payment of them, a Court of Equity will not direct an application of such estate to be made for that purpose."³

"Courts of Equity, however, as a consequence of the doctrine established by them, that a married woman may have and enjoy a separate estate, enable her to deal with it and to alien and encumber it,

¹ *Noyes v. Blakeman*, 3 Sand. S. C., 538, aff'd 2 Seld., 567; 1 R. S., 728, 729, 730, sec. 55. 60, 63; *L'Amoureux v. Van Rensselaer*, 1 Barb. Ch., 34; *Roggers v. Ludlow*, 3 Sand., 104, 108, 109; *Wadham v. The Society*, 2 Kern., 415.

² *Lillard v. Turner*, 16 B. Monr., 374; *Burch v. Breckenridge*, 16 B. Monr., 482, and *Bell v. Keller*, 13 B. Monr., 384; 1 Lead. Cas. Eq., 534.

³ 2 Roper, 235; *Coleman v. Wolley's Ex'r*, 10 B. Monr., 320; *Burch v. Breckenridge*, 16 B. Monr., 482.

where she shows an intention so to dispose of it; but that intention must be manifested by her, otherwise her separate estate will not be held liable. Its liability for her debts does not arise out of *their creation* merely, but out of an agreement by her, either expressed or implied, that it shall be liable for their payment."

It is held, also, that the only difference between charging her separate *personal* estate and her separate *realty* is, that she may charge her separate personalty by an *oral* agreement, but when she would charge her *realty*, the agreement must be in writing.¹

The power of a *feme covert* to charge or dispose of her separate property is, also, recognized in Connecticut,² Maryland,³ Alabama,⁴ Kentucky,⁵ North Carolina,⁶ Georgia,⁷ Florida,⁸ and Missouri.⁹

In Kentucky, in the case of *Daniel v. Robinson*,¹⁰ the court remarked that the recent enactments of the Kentucky R. S.,¹¹ it is believed, has changed the

¹ *Burch v. Breckenridge*, 16 B. Monr., 482.

² *Imlay v. Huntington*, 20 Conn., 149.

³ *Cooke v. Husbands*, 11 Maryl., 492.

⁴ *Ozley v. Ikelheimer*, 26 Alab., 382.

⁵ *Bell v. Kellar*, 13 B. Monr., 381; *Burch v. Breckenridge*, 16 B. Monr., 482; *Lillard v. Turner*, 16 B. Monr., 374.

⁶ *Harris v. Harris*, 7 Ired. Eq., 311.

⁷ *Wylly v. Collins*, 9 Geo., 223; *Roberts v. West*, 15 Geo., 123; *Fears v. Brooks*, 12 Geo., 195.

⁸ *Lewis v. Yale*, 4 Flor., 418.

⁹ *Whitesides v. Carman*, 23 Mo., 457; *Segond v. Garland*, 23 Mo., 547.

¹⁰ *Daniel v. Robinson*, 18 B. Monr., 301; *Pell v. Cole*, 2 J. P. Metc.

¹¹ Ky. R. S., chap. 47, tit. Husband and Wife, sec. 17, p. 395, amended 1855-56, Sess. Acts, p. 58; see also *Williamson v. Williamson*, 18 B. Monr., 386.

law on this subject. It is provided: "If real or personal estate be hereafter conveyed or devised for the separate use of a married woman, or for that of an unmarried woman, to the exclusion of any husband she may hereafter have, she shall not alienate such estate with or without the consent of any husband she may have; but she may do so when it is a gift, by the consent of the donor, or his personal representatives. Such estates heretofore created shall not be sold or incumbered, but by order of a Court of Equity, and only for the purpose of exchange or reinvestment for the same use as that of the original conveyance or devise, and the court shall see that the exchange is properly made." The change thus introduced, was made to protect the *separate estate* of a *feme covert*, from the operation of those influences, undue, fraudulent, or otherwise, which might be brought to bear upon her to induce her to sell, dispose of, or convey it away. And although cases might occur where such a power of alienation might be exercised advantageously, yet, in its general operation, the exercise of such a power has frequently resulted in the total waste and dissipation of the estate. It, therefore, seems to have been the intention of the Legislature of Kentucky thereby to secure her in the enjoyment of her *separate estate* during her life or coverture, by thus depriving her of the power to alienate it.¹ But if it be a gift to her, made since the 1st

¹ Stuart v. Wilder, 17 B. Monr., 59; Daniel v. Robinson, 18 B. Monr., 306.

July, 1852, she may convey it with the consent of the donor or his representative. It is stated that this provision was enacted not only to protect the rights of married women, by securing their estates against their own improvidence, as well as all improper influences which might be attempted to be exercised over them, but also the more effectually to secure the attainment of the object of the donor in their creation. Instead of depriving married women of any of their rights in their *separate estate*, it tends to secure them in the possession and enjoyment of them.

By an act of the Kentucky Legislature, passed in 1856,¹ it is enacted that these provisions of the Revised Statutes should not apply to conveyances made before their passage, in which *powers of sale and exchange* were expressly given; but such powers might be executed according to the intention of the instrument, when executed.

The rule that a *feme covert*, with respect to her separate estate, is to be regarded in a Court of Equity, as a *feme sole*, having the *jus disponendi* as an incident thereto, unless she is specially restrained by the instrument under which she acquires her separate estate, is denied in South Carolina, and some of the other States, and the opposite doctrine is held, that where property is settled to the separate use of a married woman, she has *no power* to charge, incumber or dispose of it, unless in so far as power to do so has been conferred on her in the

¹ Vol. I., p. 58, Sess. Acts of 1855-56.

instrument creating her estate; which power is to be strictly construed.¹

In *Reid v. Lamar*,¹ Chancellor Harper, in giving the opinion of the Court of Appeals, said, "it is the settled law of this State that where property is given or settled to the separate use of a married woman she has *no power* to charge, incumber or dispose of it, except so far as that power has been specially conferred on her by the instrument creating her estate. That it has sometimes been said, in relation to our doctrine, that a married woman is only a *feme sole sub modo*, or to the extent that the settlement made her so. Yet such expressions were inaccurate. She can in no manner of respect be considered a *feme sole*. A *feme sole* disposes of, or charges her property by her own act, and according to her own will, by her inherent power as owner. A *feme covert* exercises a *delegated* authority and cannot exceed it. She is enabled to execute a power, as, in some instances, any third person, *feme covert* or other, even those having no interest in the property, might be able to execute it and bind her by their act. While the principle is thus firmly settled in South Carolina, that the power of a married woman over her separate estate is derived from the instrument creating the estate, and that she has no other capacity to contract but as authorized or empowered by the settlement, it has been held that if the deed of settlement expressly declared that the

¹ *Ewing v. Smith*, 3 Desau., 417; *Magwood v. Johnson*, 1 Hill's Ch., 228; *Robinson v. Dart's Ex'ors*, Dud. Eq., 128; *Reid v. Lamar*, 1 Strob. Eq., 27, 37.

estate shall be liable for her own debts and contracts, it will be chargeable in equity for debts contracted by her expressly on her separate account.¹ But this is supposed to illustrate and enforce the general principle and not to disturb it. The case of *Clark v. Makenna* rested on no authority of the wife to bind her property as a *feme sole*, but upon the terms of the instrument by which her property was made liable to her debts and contracts. This resulted from the power of the grantor over the property.”

A similar rule, in this respect, obtains in Rhode Island,² Tennessee³ and Mississippi.⁴ A similar doctrine has been held in Maryland⁵ and Virginia,⁶ but recently somewhat modified.⁷ In Pennsylvania the rule is firmly settled, that a *feme covert* has no power in relation to her separate estate, but such as is expressly given to her in the deed of settlement.⁸

In *Thomas v. Folwell*, Gibson, C. J., said, “the modern doctrine of Courts of Equity is founded on

¹ *Clark v. Makenna*, Cheeve's Eq., 163.

² *Metcalf v. Cook*, 2 R. I., 355.

³ *Ware v. Sharp*, 1 Swann, 489; *Morgan v. Elam*, 4 Yerg., 375; *Marshall v. Stevens*, 8 Hump., 150; *Litton v. Baldwin*, 8 Hump., 209.

⁴ *Armstrong v. Stoval*, 26 Miss., 275; *Doty v. Mitchel*, 9 Sme. & Mar., 435, 447; *Montgomery v. The Agricultural Bank*, 10 Sme. & Mar., 567, 576.

⁵ *Farr v. Williams*, 4 Md. Ch., 68; *Williams v. Donaldson*, 4 Md. Ch., 414; *Miller v. Williamson*, 5 Md. Ch., 219.

⁶ *Williamson v. Beekham*, 8 Leigh, 20, 27.

⁷ *Woodson, Trustee, v. Perkins*, 5 Gratt., 346; *Nixon v. Rose*, 12 Gratt., 425; *Cook v. Husbands*, 11 Md., 492.

⁸ *Lancaster v. Dolan*, 1 Rawle, 231; *Lyne's Ex'or v. Crouse*, 1 Barr, 111; *Rodgers v. Smith*, 4 Barr, 93; *Thomas v. Folwell*, 2 Whar., 11.

what appears to be a misconception of the leading purpose of a settlement, which is obviously to *disable* the husband, and not to *enable* the wife, at least, further than may be consistent with the security of her title, of which the grantor ought, in the particular case, to be the judge. The object is not so much to give her the dominion of a *feme sole*, which, every man of experience knows, would, in a countless number of instances, defeat the principal intent, as to withdraw the estate from the dominion of the husband: and we might expect it would occur to those who are called to the interpretation of these instruments, that the surest way to accomplish this would be to restrain the power of both. We, therefore, hold it to be the settled law of Pennsylvania, that instead of having *every power* from which she is not negatively debarred in the conveyance, she shall be deemed to have *none but what is positively given or reserved to her*.”¹

The doctrine of Pennsylvania is not inconsistent with the doctrine declared by the court in the case of *Bradford and wife v. Greenway*,² in Alabama. The court said, “we hold that where a married woman has property settled upon her, to her separate use, and the deed of settlement provides ‘that she shall have the complete control of it as though the marriage had never taken place,’ and contains no restraint on alienation, she is to be deemed, in a

¹ *Thomas v. Folwell*, 2 Whar., 11.

² 17 Alab., 797, 805; *Peryear & Wallace v. Beard*, Trustee, 14 Alab., 122, 134; also *Peryear, Ex’or v. Peryear*, 16 Alab., 486; *Collins v. Lavenbury*, 19 Alab., 682; *Ozely v. Ikelheimer*, 26 Alab., 382.

Court of Equity, in respect to such property, a *feme sole*, and may, by her agreement, freely entered into, charge it for the payment of her husband's debts."

In California, all property owned by either husband or wife before marriage, or subsequently acquired by gift, devise, bequest, or descent, is the separate property of each. But all property otherwise acquired after marriage is common property; and, although, the husband has the management and control of her separate property during marriage, he can neither sell or incumber it in any way unless she joins in the deed and acknowledges on separate examination.¹ So, where the wife made a contract with her husband, by which she gave him money, which was her separate property, for steamboat stock owned by him, it was held by the court that, assuming the contract to be void, because made between husband and wife, the husband was thereby placed in a position of having taken his wife's money without her consent, and converted it into stock, and he thereby became her trustee, and she could follow the money into whatever property it was invested; and that, being in possession of the stock, she could hold it until fully indemnified, and that the creditors of the husband could not reach it.²

This doctrine of the *separate* estate of the wife is not to be confounded with that class of cases which arise respecting the marital rights of the husband in the *general* property of the wife; for the legal

¹ Compiled Laws of California, 1850-1853, p. 812.

² *George v. Ransom*, 14 Cal., 660.

rights secured to the wife in her *general* property as against the *general* marital rights of the husband, is not a *separate* estate. A separate estate has been defined to be, that of which she has the *exclusive* control and benefit, independent of the husband, and the proceeds of which she may dispose of as she pleases; and its character as a *separate* estate must be imparted to it by the *instrument* by which she is invested with such right to it.¹ Whereas, at law, the husband takes a qualified interest in the real estate of the wife, and the wife has only a *qualified* power of disposing of it; and the act of marriage operates as an absolute gift to the husband of all *chattels personal* belonging to the wife, and also of her *chattels real* and *choses in action*, if reduced into possession during coverture; and, if the husband have once acquired *actual possession* of the personal property to which his wife was entitled in equity, the court will not afterwards undo what has been done, or compel the husband to refund any part of the property, or to make a settlement out of it in favor of his wife.² But, in respect to her *general property*, the wife, in equity, is entitled to a settlement for her own use and benefit. The rule now settled is, that the wife's

¹ Cord's Legal and Equitable Rights of Married Women, sec. 255; Petty v. Malier, 14 B. Monr., 247; Johnson v. Jones, 12 B. Monr., 329; Colvin v. Currier, 22 Barb. Rep., 387.

² Co. Litt., 300; 1 Rop. Husband and Wife, 166, 201; 2 Kent's Com., 117; Carter v. Carter, 14 Sm. & M., 59; Carlton v. Banks, 7 Alab., 34; Van Duzer v. Van Duzer, 6 Paige, 368; Rees v. Waters, 9 Watts, 90; Thomas v. Shepherd, 2 McCord's Ch., 36; Whitesides v. Dorris, 7 Dana, 107; Wiles v. Wiles, 3 Md., 1.

equity to a settlement, and suitable provision for the maintenance of herself and children, extends to all her separate real and personal estate, descended or devised, and will prevail, when properly asserted, against the husband or his assignees even, and against any sale made, or lien created by him, even for a valuable consideration or in payment of a just debt;¹ and this rule rests upon the broad ground that, in a Court of Equity, it is regarded as her estate, which she has a right to have expressly set apart and secured, or such portion thereof as may be necessary, for the permanent support of herself and children.² But, her equitable right must be asserted directly in the pleadings, it will not be presumed. Its existence depends upon *extrinsic* circumstances, which must be averred, and if denied, be proved.³

Although the wife may secure, by a settlement, suitable provision for the maintenance of herself and children out of her real and personal estate as against her husband, and those claiming under and through him, yet he cannot be effectually excluded from a participation in the benefits of her estate, except by a limitation of it to her *separate use and*

¹ Cord's Rights of Mar. Women, sec. 155.

² Hays v. Blanks, 7 B. Monr., 348; Haveland v. Bloom, 6 Johns. Ch. R., 181.

³ Cord's Rights of Mar. Women, sec. 157; see Sturgis v. Champneys, 5 My. & Cr., 105; Elder v. Elder, 11 Sim., 569; Hanson v. Keating, 4 Hare, 6; Newenham v. Pemberton, 11 Jur., 1071; Sleight v. Reed, 18 Barb., 160; Barron v. Barron, 24 Vt., 376; Rorer v. O'Brien, 10 Barr, 212; Moore v. Moore, 14 B. Monr., 259; see also Hill v. Hill, 1 Strob. Eq., 2; Carlton v. Banks, 7 Alab., 35; see Ky. Rev. Stat., 1852, vol. ii., p. 387; Stant. Rev. p. 8, and Smith v. Long, 1 J. P. Metcalf, 487.

control. And this limitation may be such as to exclude the whole interest of the husband, as well after the death of the wife as during her lifetime, in her estate; or it may be such as to exclude his interest only during her life. But the intention to exclude the husband must appear distinctly from the terms of the limitation, or it will not have such an effect.¹

No particular form of words is necessary to create a trust for the *separate* use of a married woman. It is enough if there is a clear and unequivocal intent to exclude the rights of the husband. If it be plain from the language of the instrument, or from all the circumstances disclosed in it, that the intention was to create a separate interest in the wife, such intention will be sustained and carried out.² But the manifestation of such an intent must be clear and unambiguous, that the

¹ *Lamb v. Milnes*, 5 Ves., 517; *Tyler v. Lake*, 4 Sim., 144; *S. C.*, 2 R. & M., 183; *Rudisell v. Watson*, 2 Dever. Eq., 430; *Ashcraft v. Little*, 4 Ired. Eq., 236; *Hunt et al v. Booth et al*, 1 Freem., 215; *Williams v. Claiborn*, 7 Smedes & Marsh. 488; *Carroll v. Lee*, 3 Gill. & Johns., 505; *Evans and wife v. Knorr*, 4 Rawle, 66; *Evans v. Gillespie*, 1 Swan, 128; *Cook v. Kennerley*, 12 Alab., 42; *Moss v. McCall*, 12 Alab., 630; *Welch's Heirs v. Welch's Adm'rs*, 14 Alab., 76; *Mitchel v. Gates*, 23 Alab., 438; *Pollard v. Merrill*, 15 Alab., 170.

² *Stanton v. Hall*, 2 R. & M., 180; *Tyler v. Lake*, *ib.*, 188; *Adamson v. Armitage*, 19 Ves., 416; *ex parte Ray*, 1 Mad., 199; *Wills v. Sayers*, 4 Mad., 409; *Pritchard v. Ames*, T. & R., 222; *Perry v. Boileau*, 10 S. & R., 208; *Evans and Wife v. Knorr*, 4 Rawle, 66; *Rudisell v. Watson*, 2 Dever. Eq., 430; *Lewis v. Adams*, 6 Leigh, 320; *Ballard v. Taylor*, 4 Desau., 550; *Stuart v. Kissam*, 2 Barb., 494; *West v. West's Ex'ors*, 3 Rand., 373; *Heatham v. Hall*, 3 Ired. Eq., 414; *Hamilton v. Bishop*, 8 Yerg., 33; *Fears v. Brooks*, 12 Geo., 197; *Beaufort v. Collier*, 6 Humph., 487; *Cook v. Kenneday*, 12 Alab., 42; *Nixon v. Rose*, 12 Gratt., 425; *Clark v. Maguire*, 16 Mo., 362.

interest is not only to be vested in the wife, but the husband is to be excluded therefrom. Thus, a limitation to the "*separate use*," or the "*sole use*" of the wife,¹ or where it is to be at "*her own disposal*,"² or to be enjoyed "independent of the husband,"³ have been deemed sufficiently evincive of such an intent to vest the *separate estate* in the *feme*. So, likewise, have the following been held sufficient to create a separate estate: A conveyance to a married woman and her "heirs to have and to hold the same to and for her use, benefit and right, and of the heirs aforesaid without let, hindrance or molestation whatever;"⁴ or, "for the entire use, benefit, profit and advantage" of the wife;⁵ or, "to be at her own disposal in true faith;"⁶ or, "for her own and sole use forever;"⁷ or, "for her own proper use during her life."⁸ So, likewise, a declaration of trust for Mrs. S.: "And that the trustees would account for and pay over to her *individually* all the money that might be received thereon;"⁹ or,

¹ Scarborough v. Borman, 1 Beav., 34; 4 M. & Cr., 377; Adamson v. Armitage, 19 Ves., 416; see also Newman v. James, 12 Alab., 29; Collins v. Rudolph, 19 Alab., 616; Good v. Harris, 2 Ired. Eq., 630; Heathman v. Hall, 3 Ired. Eq., 414; Strong v. Gregory, 19 Alab., 146; Griffith v. Griffith, 5 B. Monr., 113.

² Pritchard v. Ames, T. & R., 222; Stanton v. Hall, 2 R. & M., 180; Tyler v. Lake, ib., 188.

³ Wagstaff v. Smith, 9 Ves., 420; Newlands v. Paynter, 4 M. & Cr., 408; Dixon v. Olmuis, 2 Cox, 414; Simmons v. Horwood, 1 Keen., 7.

⁴ Newman v. James, 12 Alab., 29.

⁵ Heathman v. Hall, 3 Ired. Eq., 414.

⁶ Bridges v. Wood, 4 Dana, 610.

⁷ Fisher v. Filbut, 6 Barr, 61.

⁸ Snyder v. Snyder, 10 Barr, 424.

⁹ Stuart v. Kissam, 2 Barb. S. C., 494.

“where the husband should not dispose of it without her consent;”¹ or that the estate is for the “livelihood” of the wife;² or, that she shall “enjoy and receive” the rents and profits;³ or, “for her use and benefit as the trustee may think proper and best, without being subject to her debts and contracts in any way whatsoever, or her husband, or any future husband, only for her support and maintenance.”⁴

A conveyance by a husband to a trustee for the use of his wife, will, necessarily, be for her *separate* use; otherwise the transaction would be useless.⁵ So, also, where there is a gift or grant by the husband directly to the wife for her use.⁶

Gifts and conveyances in the following terms have been held not to create a separate estate in the wife, thus: “The gift not to extend to any other person;⁷ a devise and bequest to the testator’s married daughter, “all to be for her and her heirs’ pro-

¹ *Jones v. Lockhart*, 3 Bro. C. C., 383, (n).

² *Darley v. Darley*, 3 Atk., 399; but see *Harkins v. Coalter*, 2 Port. Alab., 476.

³ *Tyrrell v. Hope*, 2 Atk., 561; *Atcherly v. Vernon*, 10 Mod., 531; also *Williams v. Maul*, 20 Alab., 721.

⁴ *Clarke v. Windham*, 12 Alab., 798.

⁵ *Steele v. Steele*, 1 Ired. Eq., 452.

⁶ *Reed v. Livingston*, 3 Johns. Ch., 490; *Pinney v. Fellows*, 15 Vt., 536; *Whitten et al. v. Whitten*, 3 Cush., 194; *Powell v. Powell*, 9 Humph., 477; *Wells v. Treadwell*, 28 Miss., 717. Such grants, however, being void in law, will be upheld by equity no further than is necessary to constitute a just and adequate provision for the wife, due regard being had to the fortune of the husband. *Benedict v. Montgomery*, 7 W. & S., 238; *Stickney v. Borman*, 2 Barr, 67; *Shepard v. Shepard*, 7 Johns. Ch., 57; *Wells v. Treadwell*, 28 Miss., 717; *Dibble v. Hutton*, 1 Day, 51; and see *Barron v. Barron*, 24 Vt., 375; *Herr's Appeal*, 5 W. & S., 491.

⁷ *Ashcraft v. Little*, 4 Ired. Eq., 236.

per use ;”¹ in trust for the “use, behoof and benefit of” the testator’s daughter for life;² in trust to permit the *feme covert* “to have the use and benefit of the labor and services of the said slaves and all the proceeds thereof during her life, and at her death” to her children;³ “to her, and the heirs of her body, and to them alone.”⁴ These, and the like terms, in a conveyance to a *feme covert* are not deemed sufficiently evincive of an intention to vest the entire interest in the wife, to the exclusion of her husband, to create in her a separate estate.

Nor will the intervention of a trustee be of itself sufficient to create a *separate estate or use* ; for property given by deed or will to a trustee in trust for a married woman, vests an interest in her husband.⁵ Nor is the intervention of a trustee necessary to the validity of a trust to the separate use of a married woman. For if real or personal property be given to her separate use, her interest will be protected by converting the husband into a trustee.⁶

¹ Rudisell v. Watson, 2 Dever. Eq., 430.

² Torbert v. Twining, 1 Yates, 452.

³ Hale v. Stone, 14 Alab., 803, and Evans v. Knorr, 4 Rawle, 66.

⁴ Foster v. Kerr, 4 Rich Eq., 390.

⁵ Evans v. Knorr, 4 Rawle, 66; Mayberry v. Neely, 5 Humph., 337; Hunt v. Booth, 1 Freem., 215; Welch’s Heirs v. Welch’s Adm’r, 14 Alab., 77; Pollard v. Merrill, 15 Alab., 170.

⁶ Boykin and Wife v. Ciples and Wife, 2 Hill’s Ch., 200; Baskins v. Giles, Rice’s Eq., 316, 324; Shirley v. Shirley, 9 Paige, 364; Freeman v. Freeman, 9 Mo., 772; Clark v. Makenna, Cheves’ Eq., 163; Hamilton v. Bishop, 8 Yerg., 33; Jamison v. Brady, 6 S. & R., 466; Heck v. Clippen-ger, 5 Barr, 385; Fears v. Brooks, 12 Geo., 195; Bennett v. Davis, 2 P. Wms., 316; Darley v. Darley, 3 Atk., 399; Lee v. Prideaux, 3 Bro. C. C., 383; Parker v. Brooks, 9 Ves., 283; Major v. Lansley, 2 R. & M., 355; Rich v. Cockell, 9 Ves., 375; Porter v. Bank of Rutland, 19 Vt., 410; Blanchard v. Blood, 2 Barb. S. C., 352. For the effect which the legisla-

And the husband who has charge of his wife's separate estate comes within the ordinary rule which prevents a trustee from taking advantage from his management of trust property, and he, therefore, cannot traffic therewith, buy incumbrances, or the like, except for her benefit.¹

However, where it is intended to secure to a married woman the separate use of an estate, either for life or during coverture, it is the more proper and usual way to do so through the intervention of a trustee. And where there is a limitation to trustees to the separate use of a married woman, the courts will strive to adopt the construction which is most for her advantage, by holding it a trust, vesting the legal estate in them, rather than a use executed by the statute in her.²

In New York, under their statute concerning *uses* and *trusts*, it has already been seen, that where lands have been conveyed to a trustee to receive the rents and profits, and pay them over to a married woman for her sole use during her life, that the *cestui que trust* takes no estate in the lands or in their future income, upon which she can create any lien or charge for any purpose whatever. That, by

tion of the State securing to married women their separate property and excluding their husbands, see *Haines v. Ellis*, 24 Penn. St. R., 253; *Noyes v. Blakeman*, 3 Sand. S. C., 538; 2 Seld, 567; *Smith v. Long*, 1 J. P. Metcalf, 487; *Sleight v. Reid*, 18 Barb., 160.

¹ *Methodist E. Ch. v. Jacques*, 3 Johns. Ch. Rep., 77; *Dickenson v. Codwise*, 1 Sandf. Ch. Rep., 214; *Harley v. Platts*, 6 Rich. L. R., 310.

² *Hill on Trustees*, 407; *Harton v. Harton*, 7 T. R., 652; *Neville v. Saunders*, 1 Vern., 415; *Bush v. Allen*, 5 Mod., 63; *Oswell v. Probert*, 2 Ves., 680; see also *Tidd v. Lister*, 5 Mad., 432; *Hawkins v. Luscombe*, 2 Sw., 391.

the operation of such statutes, she is secure in the enjoyment of the rents and profits of such estate as they accrue ; but cannot anticipate them, so as to make them the subject of a charge or lien.¹ So, likewise, in Kentucky, a radical change has been affected as to the *separate estate* of married women by their new statutory provisions. Among other things it is enacted that, "if real or personal estate be hereafter conveyed or devised for the *separate use* of a married woman, or for that of an unmarried woman, to the exclusion of any husband she may hereafter have, she shall not alienate such estate with or without the consent of any husband she may have ; but she may do so when it is a gift, by the consent of the donor or his personal representative. Such estates, heretofore created, shall not be sold or incumbered but by order of a Court of Equity, and only for the purpose of exchange and reinvestment for the same use as that of the original conveyance or devise, and the court shall see that the exchange is properly made."²

As the act of marriage operates at law, as an absolute gift to the husband, of all the *chattels personal* of the wife, and likewise gives him the legal right to reduce into his possession her *chattels real* and *choses in action*, consequently, if a sum of money or stock be vested in trustees, for a married woman,

¹ *Noyes v. Blakeman*, 3 Sand. S. C., 538, and also 2 Seld., 567, also *Yale v. Dederer*, 18 N. Y. Rep., 267; 1 R. S., pp. 728, 729, sec. 55, (3d sub.,) 60, 63.

² Ky. R. S., ch. 47, sec. 17, p. 395, amended 1856, see Session Acts, 1855-1856, p. 58; *Daniel v. Robinson*, 18 B. Monr., 301; *Williamson v. Williamson*, 18 B. Monr., 386; *Stuart v. Wilder*, 17 B. Monr., 306.

or a bond or other debt be assigned to her, if no suit has been instituted for the administration of the trust, the trustee, obligee or debtor, may pay or transfer the fund to her husband alone, and take his discharge,¹ and where the property has been actually reduced into the possession of the husband, or is not a mere right or thing in action, but a complete vested legal estate, the equity of the wife for a settlement cannot be enforced.² But if he receive or hold the property for the benefit of, or in trust for the wife, his possession will not be a bar to her equity to a settlement,³ and the declarations of the husband may be given in evidence, to show in what character the payment was received.³ The general rule is, that no dealing with the fund will amount to a reduction into possession, unless it vests the legal title thereof in the husband. For if the husband's interest is such that it must still be enforced by suit in equity, it remains an *equitable chose* in action, and will survive; as, where an executor has set apart a sum for the payment of a legacy to a

¹ Murray v. Lord Elibank, 10 Ves., 90; Glaister v. Hewer, 8 Ves., 206.

² Harton v. Harton, 7 T. R., 652; Oswell v. Probert, 2 Ves., 680; Carter v. Carter, 14 Sm. & M., 59; Carlton v. Banks, 7 Alab., 34; Rees v. Waters, 9 Watts, 90; Whitesides v. Dorris, 7 Dana, 107; Wickes v. Clarke, 8 Paige, 161; Thomas v. Sheppard, 2 McCord's Ch., 36; Mitchel v. Sevier, 9 Hump., 146.

³ Wall v. Tomlinson, 16 Ves., 413; Baker v. Hall, 12 Ves., 497; Barron v. Barron, 24 Vt., 375; Gray's Estate, 1 Barr, 329; see also Blount v. Bestland, 5 Ves., 515; Elmes v. Hughs, 3 Desaus., 155; Ross v. Wharton, 10 Yerg., 190; Wallace v. Talifero, 2 Cal., 376; Mayfield v. Clifton, 3 Stew., 375; Goehenaur's Estate, 23 Penn. St. Rep., 460. Merely joining in a suit with his wife, &c., is not sufficient. Thompson v. Ellsworth, 1 Barb. Ch., 624; Mason v. McNeil, 23 Alab., 201.

married woman,¹ or the fund has been paid into court by the trustee,² or has been transferred by the existing trustee to other persons as trustees, for the wife's benefit,³ or by filing bill against the legal holder of the property, for payment or transfer,⁴ or a decree in a *joint suit for their joint benefit*,⁵ will not destroy the wife's right of survivorship. So, likewise, a bond or legacy given to husband and wife jointly, will survive to the wife.⁶

This equity of the wife *consists in the interest she has* in these choses in action, which belonged to her at the time of her marriage, or which have subsequently become hers, during the continuance of the marriage, and out of which she may have a reasonable and adequate support, if necessary, by properly preferring her claim. The general rule on this subject is, where the property is within the reach of the court, as, if it is vested in trustees, or has been paid into court, or in any other situation which brings it within the control of the court, it will not be permitted to be removed out of that jurisdiction until an adequate provision is made for the wife, unless she has already been sufficiently provided for, or on her personal examination she thinks proper to waive the benefit of this protection, consequently,

¹ *Blount v. Bestland*, 5 Ves., 515.

² *Macauley v. Phillips*, 4 Ves., 17, 18; but see *Re Jenkins*, 5 Russ., 183.

³ *Wall v. Tomlinson*, 16 Ves., 413; *Ryland v. Smith*, 1 M. & Cr., 53.

⁴ *Pierce v. Thornley*, 2 Sim., 167, 180.

⁵ *Forbes v. Phipps*, 1 Eden, 502; *Nanney v. Martin*, 1 Eq. Ca. Abr., 68.

⁶ *Pike v. Collins*, 33 Maine, 43; *Hayward v. Hayward*, 20 Pick., 517; *Atcheson v. Atcheson*, 11 Beav., 485; and see *Rivers v. Thayer*, 7 Rich Eq., 166, and *Carson v. O'Bannon*, ib., 219.

whenever the situation of the property is such that it requires a decree or order of the court to put a party rightfully in possession of the property, the court will not deliver it over, except upon terms of settlement being made for the adequate support of the wife.¹

Ordinarily, it would seem, that where the husband or his assignee can obtain the possession of the property to which the wife's equity may attach, without coming into Chancery, this equity will not be enforced.² But still, equity has asserted the right to restrain the husband or his assignee from taking possession of the wife's property in so great a variety of cases, based upon the peculiar situation and circumstances of the case, that it would seem difficult to fix definite limits to the power which the court would exercise in any case where equity demanded interference. Thus, where the husband has misbehaved, and abandoned or ill-treated his wife, so as to justify a divorce or separation, the court will lay hold of the wife's property in action, and appropriate it to her support, and the support of her children.³ So, also, where the husband is

¹ *Howard v. Moffatt*, 2 Johns. Ch., 206; *Glen v. Fisher*, 6 Johns. Ch., 33; *Bennett v. Dillingham*, 2 Dana, 436; *Thomas v. Kennedy*, 4 B. Monr., 235; *Duvall v. Farmers' Bank*, 4 Gill. & J., 283; *Andrews v. Jones*, 10 Alab., 401; *Myres v. Myres*, 1 Bail. Eq., 24; *Bell v. Bell*, 1 Kelly, 637; *Page v. Estes*, 19 Pick., 269; *Gassett v. Grout*, 4 Mete., 486; *Davis v. Newton*, 6 Mete., 537.

² See *Heath v. Heath*, 2 Hill's Ch., 100; *Udall v. Kenny*, 3 Cow., 591; *Dodd's Trustee v. Geiger's Adm'r*, 2 Gratt., 98; *The State v. Krebs*, 6 Harris & Johns., 31; 1 Leading Cases in Equity, 496.

³ *Haviland v. Myres*, 6 Johns. Ch., 25; *Van Duzer v. Van Duzer*, 6 Paige; 365; *Rees v. Waters*, 9 Watts, 90; *Renwick v. Renwick*, 10 Paige, 421, *Martin v. Martin*, 1 Hoff., 462.

insolvent, and the wife without means of support, equity will sustain a bill by the wife, through her next friend, against the husband, his assignee or creditors, seeking to get possession of the property at law.¹ So, also, where the husband is a lunatic, equity will assert and maintain the right of the wife to her equity, and, where there is no committee, order the property to be transferred to an officer of court.² Where the wife is the ward of court, and the marriage has taken place without permission, and a contempt has thereby been committed, the court will restrain the husband and his creditors from taking possession of her estate until a proper settlement has been made. But in such cases the settlement usually extends to all kinds of her property, and also to the whole estate.³

How far a Court of Equity will take cognizance of the wife's equity upon her motion, where there is no insolvency, or incapacity, or special misconduct on the part of the husband, and sustain an original proceeding by the wife for the enforcement of her claim, seems not yet to be fully determined.⁴

¹ *Guild v. Guild*, 16 Alab., 122; *Van Epps v. Van Densen*, 4 Paige, 65; *Martin v. Martin*, 1 Hoff., 462; *Bell v. Bell*, 1 Kelly, 637.

² *Carter v. Carter*, 1 Paige, 463; *Kenney v. Udall*, 5 Johns. Ch., 464; *Rees v. Waters*, 9 Watts, 90.

³ *Kenney v. Udall*, 5 Johns. Ch., 464, and S. C., 3 Cowen, 591; *Van Duzer v. Van Duzer*, 6 Paige, 366; *Chambers v. Perry*, 17 Alab., 726.

⁴ *Lady Elibank v. Montolieu*, 5 Ves., 737; *Sturgis v. Champneys*, 5 My. & Cr., 105; *Edes v. Edes*, 11 Sim., 569; *Hanson v. Keating*, 4 Hare, 6; *Osborn v. Morgan*, 9 Hare, 434; *Newenham v. Pemberton*, 1 DeG. & Sm., 644: *For dicta*, see *Van Epps v. Van Densen*, 4 Paige, 65; *Dewall v. Covenhoven*, 5 Paige, 581; *Van Duzer v. Van Duzer*, 6 Paige, 366; *Fry v. Fry*, 7 Paige, 461; *Martin v. Martin*, 1 Hoff., 462; *Davis v. Newton*, 6 Metc., 537;

Where the property of the wife is in the hands of trustees, they may refuse to make it over to the husband, or those claiming under him, until some suitable settlement has been made upon the wife; for, in so doing, they only require what the court would itself require, if a suit were instituted. And where a bill has been filed for settlement upon the wife, the trustees will be precluded from paying over to the husband.¹ But where the husband, by a previous settlement, has become the purchaser of his wife's fortune, he will not be required to make any additional settlement upon coming into court to recover her equitable property;² and it is not essential that the settlement made by the husband on marriage, should be *expressed* to be made in consideration of the wife's fortune, or that it should refer to it even; for, if the settlement be equivalent, the husband will be held to be the purchaser: for the wife shall not have the jointure and fortune both.³ But the consideration of a settlement will apply *prima facie* only to the purchase of the wife's *then present* fortune; but, if she subsequently become entitled to additional property, the husband will

Bell v. Bell, 1 Kelley, 637; see also Parsons v. Parsons, 9 N. H., 309; Wiles v. Wiles, 3 Md. R. 1; Moore v. Moore, 10 B. Monr., 259; Wright v. Arnold, ib., 642.

¹ Macauley v. Phillips, 4 Ves., 18; Murray v. Lord Elibank, 10 Ves., 90; see also same case, 1 Leading Cases in Equity, 348; De la Garde v. Lempiere, 6 Beav., 344; Crook v. Turpin, 10 B. Monr., 243.

² Martin v. Martin, 1 Coms., 473; Mitford v. Mitford, 9 Ves., 96; Garforth v. Bradley, 2 Ves., 677; Carr v. Taylor, 10 Ves., 579; Druce v. Denison, 6 Ves., 395; Adams v. Cole, 2 Atk., 449, n.; Brett v. Forcer, 3 Atk., 405; Lancy v. Duke of Athol, 2 Atk., 448.

³ Blois v. Herford, 2 Vern., 502; Salway v. Salway, Amb., 692.

not be deemed to have become a purchaser by settlement of such additional interest,¹ unless from the language of the settlement her subsequent acquisitions may be deemed to have been included, as, where the settlement is expressed to have been in consideration of such fortune as the wife *is or may* be entitled to, &c.² And the fact that a wife is living separate from her husband by mutual agreement, will not give her an equity to a settlement out of her future property, where such a provision has already been settled upon her as would have entitled the husband to such future property, had they continued to live together.³ But a voluntary settlement of an adequate provision upon the wife after marriage, will not bar the wife's equity.⁴ Nor will a settlement made in consideration of a *part only* of her future fortune.⁵ But such purchase does not bar the wife's right of survivorship, until the husband reduces the property to possession. The purchase operates merely as a power for him to acquire possession of the fund by taking a transfer from the trustee; and if he neglects to do so during his lifetime, it will survive to the wife on his death in

¹ Matter of Beresford, 1 Desaus., 263; Barrow v. Barrow, 18 Beav., 529; Carr v. Taylor, 10 Ves., 579; Mitford v. Mitford, 9 Ves., 95; Druce v. Denison, 6 Ves., 395; Garforth v. Bradley, 2 Ves., 677.

² Garforth v. Bradley, 2 Ves., 677; Mitford v. Mitford, 9 Ves., 96; Carr v. Taylor, 10 Ves., 579.

³ Re Erskine's Trusts, 23 Law J. Ch., 327; 19 Jur., 156, and 1 Kay & Johns., 302.

⁴ Lanoy v. Duke of Athol, 2 Atk., 448; Dunkley v. Dunkley, 2 DeG., Mac. & G., 390; Matter of Beresford, 1 Desaus., 263.

⁵ Cleland v. Cleland, Pr. Ch., 63; Burdon v. Dean, 2 Ves.. Jr., 607.

her lifetime.¹ It is now well settled that *choses in action*, legal and equitable, including legacies and distributive shares of the wife, survive to her on the death of her husband, unless they have been in some manner, *constructive or actual*, reduced to possession in his lifetime.²

It has already been remarked that the wife's equity will be enforced against all persons claiming under the husband, whether claiming as assignees by operation of law on his bankruptcy, or under some *particular* disposition or assignment, either made voluntarily or for a valuable consideration; but an exception, it is claimed, should be made where the wife's equitable interest is for *life only*, and against a purchaser for a valuable consideration from the husband, made while he was maintaining the wife, and before circumstances had raised her equity.³ The reason for the distinction is said to be that, both in law and equity the husband is entitled to the receipt of his wife's income from

¹ *Rudyard v. Neirim*, Pr. Ch., 209; *Lister v. Lister*, 2 Vern., 68; *Mitford v. Mitford*, 9 Ves., 96; *Salway v. Salway*, Ambl., 692; *Heaton v. Hassell*, 4 Vin. Abr., 40.

² See *Pike v. Collins*, 33 Maine, 43; *Hayward v. Hayward*, 20 Pick., 517; *Parsons v. Parsons*, 9 N. H., 309; *Schuyler v. Hoyle*, 5 Johns. Ch. Rep., 196; *Searing v. Searing*, 9 Paige, 283; *Poor v. Hazleton*, 15 N. H., 568; *Legg v. Legg*, 8 Mass., 99; *Stanwood v. Stanwood*, 17 Mass., 57; *Lodge v. Hamilton*, 2 S. & R., 491; *Rice v. Thompson*, 14 B. Monr., 379; *Whitehurst v. Harker*, 2 Ired. Eq., 292; *Terry v. Bronson*, 1 Rich. Eq., 78; *Picket v. Everett*, 11 Mo., 568; *Bibb v. McKinley*, 9 Port., 636; *Sayre v. Flourney*, 3 Kelly, 541.

³ *Vaughn v. Buck*, 7 Jur., 338; 13 Sim., 404, and 1 Sim., (N. S.), 284; *Tidd v. Lister*, 23 Law Jur. Ch., 249; 2 Spence Eq. Jur., 482; *Udall v. Kenney*, 3 Cowen, 607; *Elliott v. Cordell*, 5 Mad., 156; *Stanton v. Hall*, 2 R. & M., 175; *Burdon v. Dean*, 2 Ves., Jr., 608; but see *Lord Langdale* in *Wilkinson v. Charlesworth*, 10 Beav., 327.

property, as a compensation for his liability to maintain her; and, therefore, he is entitled to the uncontrolled beneficial enjoyment of her *life interests* unless he desert her, or otherwise fail in the discharge of his duty of maintenance of her. In case of *general bankruptcy or insolvency* his inability to maintain his wife will *already* have raised an equity in her favor, when the title of his assignees vests; which is not the case with a *particular assignee*, made while the husband is in the discharge of his duty in maintaining his wife.¹ But this assignment of the life interest of the wife will be good only during coverture, and will not bind her if she survive.²

It is laid down in many of the American decisions that an assignment for value by the husband amounts to a contract, which equity would execute against him by compelling a reduction; and, therefore, under the rule of treating as done, what ought to be done and is agreed to be done, the court will treat as executed, such an assignment after the husband's death.³ But in answer to this, it is said, the husband has *not a property in*, but only a *naked power over* his wife's *choses in action*, which arises from the blending of persons in the marriage state; and he cannot transfer to his assignee more than he himself possesses, which is only the right of reduc-

¹ Carter v. Anderson, 3 Sim., 370; 1 Rep. on Hus. and Wife, 273; Elliott v. Cordell, 5 Mad., 156; Stanton v. Hall, 2 R. & M., 182; Vaughn v. Buck, 1 Sim., N. S., 284.

² Stiffee v. Everett, 1 M. & Cr., 41.

³ Siter's Case, 4 Rawle, 461.

tion *during coverture*. Hence, to apply to this case the usual rule in equity in regard to specific performance, would be to convert a *limited* into an *absolute* power. Again, the equitable principle referred to is admissible only as between the purchaser and the assignor and his representatives. But the wife does not claim through her husband, but on a distinct title. And, further, a Court of Equity does not, except in peculiar cases, compel specific performance of a contract with regard to personal property, but leaves the parties to their remedies at law. And, though the assignment of a chose in action imports in equity an agreement by the assignor to allow his name to be used by the assignee, this could only bind the executor of the husband, not the wife, after his death. Finally, in the case of a chose in action proper, the legal title in the wife must prevail, if the equities are equal; and undoubtedly the wife has, as owner, an equal equity with the purchaser. Indeed, considering the peculiar favor with which *femes covert* are regarded in a Court of Chancery, and its strongly-marked doctrines with regard to their separate estate, it might well be doubted whether her equity should not be considered superior. With regard to the *equitable* interests of the wife, the case is still clearer, for equity only recognizes the husband's rights over them, because it is bound to follow the law.¹

¹ See Wharton's notes in Hill on Trustees, p. 415, 3d Am. ed.; see also Purdew v. Jackson, 1 Russ., 1; Hutchings v. Smith, 9 Sim., 137; Elwin v. Williams, 7 Jur., 338; 12 L. J. Ch., 440; same case under name of Ellison



In case the husband survive the wife, then he, as her administrator, is absolutely entitled to all her personal estate, though it continue in action and unrecovered at the time of her death.¹ And, although, he die before the property is reduced to possession, his representatives will be entitled, and not the next of kin of the wife.² Hence, it follows that an assignment by the husband of his wife's *choses in action* or equitable interest in personalty, is good against every one except her, surviving; for it will, of course, be binding on himself and all parties claiming under him.³

It has already been seen that, in equity, a married woman is considered as a *feme sole* in respect to her *separate* property.⁴ That where *personal estate* is given simply to her separate use, without restricting her power of disposing of it, or prescribing the

v. Elwin, 13 Sim., 309; *Ashby v. Ashby*, 1 Coll., 554; *Wilkinson v. Charlesworth*, 10 Beav., 328; *Le Vasseur v. Scranton*, 14 Sim., 118; *Borton v. Borton*, 13 Jur., 247; 16 Sim., 552. *Contra*, *Siter's Case*, 4 Rawle, 461; *Duke of Chandos v. Talbot*, 2 P. Wms., 608; *Lord Carteret v. Pascall*, 3 P. Wms., 197; *Bates v. Dandy*, 2 Atk., 207; S. C., 1 Russ., 33, n., and 3 Russ., 72, n.; *Wright v. Morley*, 11 Ves., 20, 21; *Grey v. Kentish*, 1 Atk., 280; *Hawkins v. Obyn*, 2 Atk., 549; *Pascall v. Thurston*, 2 Bro. P. C., 19; *Honor v. Morton*, 3 Russ., 68, 69.

¹ *Hill on Trustees*, 418; *Squib v. Wyn*, 1 P. Wms., 378; *Whitaker v. Whitaker*, 6 Johns. Rep., 112; *Hunter v. Hallett*, 1 Edw. Ch., 388; *Hoskins v. Miller*, 2 Dev. R., 360; *Lockwood v. Stockholm*, 11 Paige, 87; *Beggert v. Beggert*, 7 Watts, 563; *Wilkinson v. Perrin*, 7 B. Monr., 214; *Jackson v. Sublitt*, 10 B. Monr., 469; *Lowry v. Houston*, 3 How. Miss., 394; but see, *contra*, *Curry v. Fulkinson*, 14 Ohio, 100; *Baldwin v. Carter*, 17 Conn., 201; *Byrne v. Stuart*, 3 Desau., 135.

² *Elliott v. Collier*, 3 Atk., 526; *Humphrey v. Bullen*, 1 Atk., 458; *Cart v. Rees*, 1 P. Wms., 381.

³ *White v. St. Barb*, 1 Ves. & B., 405; *Rankin v. Bernard*, 5 Mad., 32.

⁴ *Ante*, and authorities cited; *Hill on Trustees*, 421, and notes; *Hulme v. Tenant*, 1 Bro. C. C., 21; 1 Lead. Ca. Eq., 355, and notes.

mode in which that power is to be exercised, she will take the property with an absolute power of alienation. That when real property is limited absolutely to the *separate use* of a married woman, she can dispose of it only in the manner prescribed by law, unless a power of disposition be expressly reserved to her by the settlement or antenuptial agreement, or other instrument of gift.¹ But she may be restrained by the terms of the trust, from alienating or anticipating the income from her separate estate, during the continuance of coverture.² The prohibition against alienation in such cases, becomes an essential part of the separate estate, and will stand or fall with it.³ But this restraint will operate only during coverture; after the death of her husband she will be fully competent to dispose of her property notwithstanding the existence of

¹ *Peacock v. Monk*, 2 Ves., 192; Sand. on Uses and Trusts, 380; *Newcomer v. Hassard*, 4 Ir. Ch. Rep., 274; *Harris v. Mott*, 14 Beav., 169. The authorities in the United States are divided on certain points. On one hand, the feme covert is held to possess only such power over her separate estate as is expressly given her, in Pennsylvania, South Carolina, Rhode Island, Maryland, Mississippi, Tennessee. On the other hand, it is held that she takes her separate property with the right to dispose of it, unless that right is prohibited in the gift instrument, in New Jersey, Connecticut, Kentucky, Virginia, North Carolina, Alabama, Georgia and Missouri. See ante. In New York, the same doctrine was held until some recent decisions under the revised statutes, which limit the power of the wife over her separate real estate, where the trust is to pay over the rents and profits to her for life, to the mere right to receive them as they become due, without any power of sale or charge, etc. See ante.

² *Hulme v. Tenant*, 1 Bro. C. C., 16; *Pybus v. Smith*, 3 Bro. C. C., 340, and 1 Ves., 189; *Jackson v. Hobhouse*, 2 Mer., 487; *Freeman v. Flood*, 16 Geo., 528; but see *Ins. Co. v. Bay*, 4 Coms., 11; *Baker v. Bradley*, 25 L. J. Ch., 7; *Rennie v. Ritchie*, 12 Cl. & Fin., 204.

³ *Tullett v. Armstrong*, 4 M. & Cr., 394; *Rennie v. Ritchie*, 12 Cl. & Fin., 204; *Robinson v. Wheelwright*, 20 Jur., 32.

such restrictive clause.¹ In case of a second marriage, this restriction will not be *extinguished*, but only *suspended* during discoverture, and will reattach on her second marriage.² In the case of Gaffee's trust,² the property of the wife, by a postnuptial settlement, was vested in trustees, in trust to pay the income "to such person or persons, and for such purposes; as she should appoint; but not so as to dispose of the same by way of anticipation; and in default of appointment, into her own hands for her separate use, notwithstanding her coverture, independent of the said Gaffee," her then husband, "who is not to intermeddle therewith; neither is the same to be subject or liable for his debts, contracts or engagements." No express trust for life was limited to the wife, but an estate for life was given to the husband after the decease of the wife; and after the decease of the survivor, the trust property was limited to the children of the marriage. Lord Chancellor Cottenham held that "the clause against anticipation was not confined to the then existing coverture, but extended to a subsequent marriage;" remarking further, "it is now well settled, that a gift to the separate use without power of anticipation, will operate on all the covertures of a woman unless these provisions are destroyed while she is *discovert*."

¹ Knight v. Knight, 6 Sim., 121; Tullet v. Armstrong, 4 M. & Cr., 406; Brown v. Pocock, 2 R. & M., 210; Hamersley v. Smith, 4 Whar., 126; Smith v. Starr, 3 Whar., 62; Harrison v. Brolasky, 20 Penn., 299; see Clark v. Windham, 12 Alab., 800.

² Clarke v. Jacques, 1 Beav., 36; see 4 M. & Cr., 290; Gaffee's Trust, 6 Hare, 101; Roberts v. West, 15 Geo., 123.

It is quite clear that a widow during her discovery would have the power of absolutely alienating her trust property, notwithstanding a restriction against anticipation during coverture. But it might be a question whether a settlement by her on her second marriage, limiting the property to herself absolutely for her separate use, would remove the previous restriction.

Although the separate use and restraints against alienation and anticipation in the case of married women are the mere creatures of equity, imposed for their benefit, yet they cannot be dispensed with by the court, even though the interest of the married woman may require it. Thus, where a testator gave a legacy to a married woman on the condition that she should convey to a third person, her interest in certain property of little value, including an estate which was settled to her separate use without power of alienation, it was held, that the condition could not be performed, and hence the legacy must fail.¹ But it has been held, that when the restraint against alienation fell within the rule against perpetuities, it was invalid and would be stricken out.²

It is laid down as a rule, that an express negative declaration, or that which is equivalent thereto, is requisite to deprive a married woman of her *prima facie* right of disposing of her separate estate.³ Thus, where the trust was to pay the income to such persons and for such purposes as the wife should, by

¹ Robinson v. Wheelwright, 20 Jur., 32.

² Fry v. Capper, Kay, 163.

³ 2 Rep. Hus. and Wife, 236, 240; Hill on Trustees, 422.

any writing under hand, *except in any mode of anticipation*, appoint, and in default of such appointment, into her hands, it was held that the words were sufficient to restrict the wife from anticipation.¹ And if the intention to restrain the power of alienation be clearly collected from the several clauses of the will, they will all be construed together, and effect will be given to the general intention.² And this restraint upon *anticipation* will also effectually prevent a married woman from charging her *separate estate* with the payment of her debts.³

Where the absolute beneficial interest in a trust is given for the *separate use of a feme*, without any restriction as to the mode of possession or enjoyment, she may require an immediate transfer of the legal interest to herself from the trustee, whether she was unmarried at the time the trust was created or not,⁴ and she may compel them by bill, if they refuse; but, in any suit instituted respecting her separate estate, her husband must be joined as defendant.⁵ It follows, also, that in such disposition of her *separate estate*, the concurrence of her trus-

¹ Moore v. Moore, 1 Col., 54.

² Baggett v. Meux, 1 Col., 138, and 1 Phill. 627; Fears v. Brooks, 12 Geo., 200; Freeman v. Flood, 16 Geo., 528; Harrop v. Heaward, 3 Hare, 624.

³ Harnett v. McDougall, 8 Beav., 188; see also Noyes v. Blakeman, 2 Seld., (6 N. Y.,) Rep., 581; Yale v. Dederer, 18 N. Y. Rep., 267; but see remarks in Clarke v. Windham, 12 Alab., 800.

⁴ Thornley v. Yates, 1 N. C. C., 438.

⁵ Bradley v. Emerson, 7 Vert., 369; Clarkson v. De Peyster, 3 Paige, 336; Dewall v. Covenhoven, 5 Paige, 581; Grant v. Van Schoonhoven, 9 Paige, 225; Stuart v. Kissam, 2 Barb. S. C., 493; Sherman v. Burnham, 6 Barb. S. C., 403; Wilson v. Wilson, 6 Ired. Eq., 236; Hill on Trustees, 424.

tees will not be necessary, unless made so, by the terms of the settlement or gift instrument;¹ and although the trustees may have given notice that they would not concur in such disposition, yet they will be compelled to give legal effect to it, upon bill filed for that purpose.² In the case of *Essex v. Atkins*,² Sir William Grant said, "If the transaction cannot be impeached upon its own merits, I do not see how any declaration by the trustee can render it null and void. Notwithstanding Lord Rosslyn's doubt, the established doctrine is, that a married woman can bind her separate property without the trustees, unless their assent is rendered necessary by the instrument giving her the property. Their dissent cannot have any effect, where their assent is not necessary." And it will make no difference if the transaction is entirely for the benefit of her husband.³ However disinclined a Court of Equity may feel to give effect to the improvident engagement of a wife for the accommodation of her husband, still it cannot refuse to do so, when, with full knowledge of the nature and extent of the transaction, and laboring under no undue influence, she has freely made an actual disposition of her

¹ *Coryell v. Dunton*, 7 Barr, 532; *Essex v. Atkins*, 14 Ves., 542; *Grigby v. Cox*, 1 Ves., 518; *Wagstaff v. Smith*, 9 Ves., 520.

² *Essex v. Atkins*, 14 Ves., 542; see also *Wagstaff v. Smith*, 9 Ves., 520.

³ *Stamford v. Marshall*, 2 Atk., 69; *Parkes v. White*, 11 Ves., 209; *Essex v. Atkins*, 14 Ves., 542; *Hughes v. Wells*, 9 Hare, 749; *Dallam v. Wampole*, 1 Pet. Cir. Ct., 111; *Jaques v. Methodist Church*, 17 Johns. Rep., 548; *Whitall v. Clark*, 2 Edw. Ch., 149; *Cruger v. Cruger*, 5 Barb. S. C., 225; *Hoover v. Samaritan*, 4 Wheat., 445; *Meriam v. Harson*, 2 Barb. Ch., 232.

separate estate for her husband's benefit.¹ But where a wife mortgages or pledges her *separate* estate for her husband's debts, she is entitled to all the rights of a surety, and to exoneration out of his estate.² If she permit him to use her *separate* estate, he will not be liable for interest, unless there is an agreement to that effect, expressed or implied from the mode of dealing.³ The accumulations or savings of the *separate estate*, or *purchases made with them*, belong to the wife, and are subject to the same rules as the principal.⁴

Where there is a *separate use* of personal estate given for life, there being no limitation in default of appointment, and the wife dies without disposing of it, the husband will be entitled to it absolutely, and the trust will be at an end.⁵

¹ *Essex v. Atkins*, 14 Ves., 546; *Dallam v. Wampole*, 1 Pet. Cir. Ct., 116; *Nedby v. Nedby*, 5 DeG. & S., 377; *Jaques v. Methodist Church*, 17 Johns. R., 548; *Cruger v. Cruger*, 5 Barb. S. C., 225; *Wagstaff v. Smith*, 9 Ves., 520; *Parkes v. White*, 11 Ves., 209.

² *Speidle v. Weishlee*, 16 Penn. St. Rep., 134; *Neimcewicz v. Gahn*, 3 Paige, 614; *Knight v. Whitehead*, 26 Miss., 246; *Hudson v. Carmichael*, 23 L. J. Ch., 893.

³ *Roach v. Bennett*, 24 Miss., 98.

⁴ *Messenger v. Clark*, 5 Exch. Rep., 388; *Bird v. Peagram*, 13 C. B., 639; *Gore v. Knight*, 2 Vern., 535; *Churchill v. Dibbin*, 9 Sim., 447; *Moloney v. Kennedy*, 10 Sim., 254; *Darkin v. Darkin*, 23 L. J. Ch., 890; *Merritt v. Lyon*, 3 Barb. S. C., 110; *Hoot v. Sorrell*, 11 Alab., 386; *Kee v. Vossler*, 2 Ired. Eq., 553; *Barron v. Barron*, 24 Vert., 375; *Yardly v. Ranb*, 5 Whart., 123; *Young v. Jones*, 9 Humph., 551.

⁵ *Molony v. Kennedy*, 10 Sim., 254; *Johnston v. Lumb*, 15 Sim., 308; *Prondley v. Fielder*, 2 My. & K., 57; *Stewart v. Stewart*, 7 Johns. Ch., 229; *McKennan v. Phillips*, 6 Whart., 576; *Brown v. Brown*, 6 Humph., 127; *Rogers v. White*, 1 Sneed, 69; *Cox v. Coleman*, 13 B. Monr., 453; *Brown v. Alden*, 14 B. Monr., 141; *Farie's Appeal*, 23 Penn. St. Rep., 29; also in New York, under the married women's acts of 1848 and 1849, see *McCosker v. Golden*, 1 Brad. Sur. Rep., 64.

When a married woman is living with her husband, and permits him, without objection on her part, to receive the income of her separate estate, or to appropriate any annual payments directed to be made to her, it will be presumed that this was done by her consent; and that which is thus received becomes absolutely his, and he is not answerable to her or her representatives for it.¹ It follows, therefore, that a trustee making such payments, or by whom they were sanctioned, will not be held responsible. The safe way for the trustee, however, would be, to require the assent of the wife, although the court have sanctioned such payments where the wife was *non compos*, and therefore incapable of giving either her assent or dissent from such payments.² But where the income was laid out in furniture under the express understanding that it was to be kept separate, or that the goods and furniture were to be taken in the name of the wife, it cannot be taken as the property of the husband:³ but otherwise, if taken in the name of the husband, and mingled with his goods or furniture,⁴ So, likewise, it is held, that under the "Married Woman's Act" of many of the States, the earnings or savings of

¹ *Smith v. Camelford*, 2 Ves., 698; *Aston v. Aston*, 1 Ves., 167; *Parkes v. White*, 11 Ves., 225; *Peacock v. Monk*, 2 Ves., 190; *Squire v. Dean*, 4 Bro. C. C., 326; *M. Ch. v. Jaques*, 3 J. C. R., 77; *McGlinsey's Appeal*, 14 S. & R., 64; *Miller v. Williamson*, 5 Md. R., 219; *Moore v. Furgeson*, 2 Mumf., 421.

² *Howard v. Digby*, 8 Bligh N. P., 224; but see *Nettleship v. Nettleship*, 10 Sim., 236, and likewise remarks on this case in *Sugden's Law of Property*, 165.

³ *Taggart v. Talcott*, 2 Edw. Ch., 628; *Shirley v. Shirley*, 9 Paige, 363.

⁴ *McGlinsey's Appeal*, 14 S. & R., 64; *Shirley v. Shirley*, 9 Paige, 363.

the wife, not out of her separate estate, belong to the husband, etc.¹ Where the husband has been permitted to receive the income of the separate estate of his wife, during his life, without objection or interference, the accumulations from that source will belong to him absolutely, and at his death, will go to his personal representatives:² this arises from the presumption that the fund was placed by her at his absolute disposal. This right of the husband to receive the income of his wife's separate estate, rests solely on her assent, expressed or implied, and where such assent does not expressly exist, or cannot be properly implied, the trustee would not be justified in making payments to him.³

It was held by Lord Cottenham, in the case of *Massey v. Parker*,⁴ where property was given or settled to the *separate use* of a woman *who was unmarried at the time*, that it would vest, on her marriage, in her husband, absolutely in his marital right; and this doctrine has been followed in a few cases, in America.⁴ But in England it is now well settled that a trust for a woman's separate use may be effectually created, although she be unmarried at the time, and no particular marriage is in contemplation: and if she marry at any time afterwards the

¹ *Raybold v. Raybold*, 20 Penn., 308; *Henderson v. Warmack*, 27 Miss., 830; *Merritt v. Smith*, 37 Maine, 394.

² *Lord Beresford v. Archb. of Armagh*, 13 L. J., N. S., Ch., 235, and 8 Jur., 262, and 13 Sim., 643; *Canton v. Ridout*, 1 Mac. & G., 519.

³ *Bagot v. Bagot*, 10 L. J., N. S., Ch., 116; *Thrupp v. Harman*, 2 M. & K., 516; *Aston v. Aston*, 1 Ves., 267; *Ridout v. Lewis*, 1 Atk., 269.

⁴ 2 M. & K., 174; *Hamersley v. Smith*, 4 Whart., 126; *Lindsey v. Harrison*, 3 Eng., (Ark.,) Rep., 311.

trust will immediately attach upon the property so as to exclude the husband's title, although no further settlement be executed,¹ and the same doctrine is well settled in this country.²

Deeds of separation between husband and wife, in which a separate maintenance is provided for the wife, are to a limited extent valid, and will be enforced in equity. "The law on this subject has been considerably modified in England, by the case of *Wilson v. Wilson*,³ where it was held that the Court of Chancery, in the exercise of its ordinary jurisdiction, can decree specific performance of articles of separation between husband and wife, so far as they regard an arrangement of property agreed upon. In this case, the husband, in order to stop proceedings in the ecclesiastical court, for nullity of marriage, entered into articles of separation. The wife subsequently applied by bill for execution of a deed carrying the articles into effect, which was decreed, and the husband was restrained by injunction from further proceedings in the Ecclesiastical Court, to compel his wife to continue the suit. It seems that the wife would also have been restrained had it been necessary. This case appears to cover the whole ground, and to authorize the interference of equity in all cases, and not merely in the enforce-

¹ *Tollett v. Armstrong*, 1 Beav., 1, and 4 M. & Cr., 390; *Scarborough v. Bowman*, 1 Beav., 34, and 4 M. & Cr., 377; *Anderson v. Anderson*, 2 M. & R., 427.

² *Nix v. Bradley*, 6 Ruh. Eq., 43; *Fears v. Brooks*, 12 Geo., 197; *Robert v. West*, 15 Geo., 123; *Fellows v. Tann*, 9 Alab., 1003; *Beaufort v. Collier*, 6 Humph., 487; *Shirley v. Shirley*, 9 Paige, 363.

³ 1 House of Lords Cases, 538, affirming S. C., 14 Sim., 405.

ment of the separate provisions. Accordingly, where a husband entered into a deed of separation in which he covenanted that he would permit his wife to live separate from him, and would not molest her, nor visit her, without her consent, an injunction was granted, to restrain him from breaking the covenant, and the terms of the injunction are very stringent.”¹ In the United States, equity will not decree the specific performance of such articles, though where executed, it will enforce the collateral engagements with the trustees, the same as in England.²

In case of a deed of separation between husband and wife, it is deemed necessary that there should be a trustee for the wife in order to give validity to any provisions for her separate maintenance. In the case of *St. John v. St. John*,³ Lord Eldon, C., remarked: “Upon this particular case, the questions are, 1st. Are these deeds good at law?—deeds of separation executed by husband and wife; 2d.

¹ *Saunders v. Rodway*, 16 Jur., 1005; see also *Green v. Green*, 5 Hare, 400, note, and *Wilson v. Wilson*, 5 H. Lords Ca., 40; 23 L. J. Ch. 697; *Hill on Trustees*, 426, note (1).

² *Bettle v. Wilson*, 14 Ohio, 257; 2 Kent's Com., 176, n.; *Champlin v. Champlin*, 11 Hoff. Ch., 55; *Mansfield v. Mansfield*, Wright, O., 284; *Hutton v. Duay*, 3 Barr, 100; *Simpson v. Simpson*, 4 Dana, 140; *Sterling v. Sterling*, 12 Geo., 201; *McCrocklin v. McCrocklin*, 2 B. Monr., 370; *Mercein v. The People*, 25 Wend., 77; *Reed v. Beazley*, 1 Blackf., 97; *Rogers v. Rogers*, 4 Paige; *Carter v. Carter*, 14 Sme. & M., 59; English authorities on same points, *Lord St. John v. Lady St. John*, 11 Ves., 526; *Cook v. Wiggins*, 10 Ves., 191; *Guth v. Guth*, 3 Bro. C. C., 614; *Wilson v. Wilson*, 14 Sim., 405, and 1 H. Lords Ca., 538; *Elworthy v. Bird*, 2 S. & St., 372; *Frampton v. Frampton*, 4 Beav., 287; *Seeling v. Crawley*, 2 Vern., 386.

³ *St. John v. St. John*, 11 Ves., 531.

Are they to be enforced in equity?; 3d. If not good at law, are they to be delivered up in equity? If good at law, I see no reason at present to say they are not good in equity. But, as against the wife, it is impossible either in law or equity to hold them good: for she cannot execute any deed. I frequently asked Mr. Justice Butler, who found it difficult to answer that, how, if she was in the same situation of *feme sole*, she got into that situation. It is admitted that, until separated, she cannot form or make herself liable to any contract; yet is asserted that it is competent to her, before she is in that state, to remove herself by contract *out* of the state in which she is, into that in which she will, for the first time, become capable of making a contract. The question has never been put upon the contract of the husband and wife, but upon the contract between the husband and the trustee, from the covenant of the trustee to indemnify the husband against her debts, the existence of which covenant ought to have reminded the court that those who framed these instruments had no idea the wife herself was bound."

In the case of *Legard v. Johnson*,¹ Lord Chancellor Loughborough said, "The first is a general question, taking it in the largest extent, is a suit in equity competent to give effect, by the aid of this court, to a deed of separation between husband and

¹ *Legard v. Johnson*, 3 Ves., 358, 359; *Whorewood v. Whorewood*, 1 Rep. Ch., 118, and 1 Ch. Cas., 250; see 1 Fonb. Tr. Eq., 94, 96; *Mildmay v. Mildmay*, 1 Vern., 53; 2 Ch. Cas., 102; *Hineks v. Nelthorp*, 1 Vern., 201; *Head v. Head*, 3 Atk., 295, 547; *Seeling v. Crawley*, 2 Vern., 386.

wife. To state the case as a general question fairly, I must suppose articles of separation from discordant tempers, without reproach on the one side or the other. Can I, under such circumstances, find a case to entitle the wife to a personal decree against the husband. I cannot state the transaction to be higher, in point of law, than a personal contract *stante matrimonio* between the husband and wife; but I must go further, I must consider that contract a *separation*, by which they exclude and exonerate one another, as far as they can, from the rights and duties arising from matrimony. But the common law will not entertain a suit upon contract by a wife against her husband. Such a contract is incapable at law of producing any action. The Ecclesiastical Court, according to the jurisdiction of this country, has exclusive cognizance of the rights and duties arising from the state of marriage. Therefore, I am completely at loss to discover an equity to control the common law and admit a suit between husband and wife upon a personal contract, and supersede the exclusive jurisdiction of the Ecclesiastical Court by entering into the consideration of it. In looking through the cases from the time the reports commenced to be tolerably accurate, soon after the restoration, when the jurisdictions were again established, I find that not an idea of that kind was entertained in that famous case of *Whorewood v. Whorewood*, in any account of it. Soon after the civil war there had been a decree by the Lords Commissioners. There being no Ecclesiastical Court, the jurisdiction some way or other got here.

After the restoration, when the jurisdictions were established again, the decree of the Commissioners was to be reviewed. Lord Clarendon was assisted, and after great discussion, it ended in throwing the case back for the decision of the competent jurisdiction. The next case is *Mildmay v. Mildmay*, soon afterwards. Lord Nottingham would not entertain any jurisdiction upon a contract between husband and wife. In *Hinks v. Nelthorp*, a demurrer was put into the discovery upon the ground that it was not a matter properly examinable or relievable in this court, and the demurrer was allowed, and the jurisdiction disaffirmed. In the opinion Lord Hardwick gave in *Head v. Head*, there is the same opinion of the defect of jurisdiction in the general case in this court, and he observed that where the court had interfered they had very unwillingly acted at all. Those cases to which he alludes where the court had acted, stand under three heads: where a *third* party had intervened, and it was not between husband and wife only. A third party binding himself to indemnify the husband against the debts of his wife, the interest of that party raises a consideration for that party, between whom and the husband there might be a contract, and with regard to whom, he might bind that party to himself. That was the case of *Seeling v. Crawley*. The circumstances there were a little favorable. The third party was father to the wife. He bound himself to indemnify the husband."

Such is the ground upon which the intervention of a trustee has been deemed essential to give

validity to any provisions for the separate maintenance of the wife; and it has been generally ruled in the United States that the intervention of a trustee is necessary to validate deeds of separation.¹ But courts have not always adhered rigidly to this doctrine. There are cases where the intervention of a trustee has been dispensed with.²

But to put all these doubtful questions at rest, it is the more convenient and proper way in deeds of separation between husband and wife to interpose a trustee on the part of the wife, who, in consideration of the separate provision, should covenant to indemnify the husband against the debts, &c., of the wife, and thus create a valuable consideration which will support the transaction against even the creditors of the husband, and enable the wife, through her trustee, to enforce the undertakings of the husband.³

Where property is vested by a separation deed in trustees for the benefit of the wife, she takes it subject to all the disabilities of coverture, and will have no power to dispose of it or otherwise charge it by her contract. In the case of *Heyde v. Price*,⁴

¹ *Carter v. Carter*, 14 Smedes & Mar., 59; *Tourney v. Sinclair*, 3 How. Miss., 324; *Watkins v. Watkins*, 7 Yerg., 283; *Carson v. Murray*, 3 Paige, 483; *Bettle v. Wilson*, 14 Ohio, 257; see 2 Kent's Com., 176, and notes.

² *More v. Ellis*, Bunb., 205; *Guth v. Guth*, 3 Bro. C. C., 614; *Frampton v. Frampton*, 4 Beav., 294; *Hutton v. Duey*, 3 Barr, 100; *Barron v. Barron*, 24 Vt., 375; see *Picket v. Johns*, 1 Dev. Eq., 123, and *Bowers v. Clark*, Phil. Rep., 561.

³ *Stevens v. Olive*, 2 Bro. C. C., 90; *St. John v. St. John*, 11 Ves., 526; *Worrall v. Jacob*, 3 Mer., 256, 270; *Elworthy v. Bird*, 2 S. & St., 381; *Jee v. Thurlow*, 2 B. & Cr., 553; *Copis v. Middleton*, 2 Mad., 430; *Nunn v. Wilsmore*, 8 T. Rep., 528; *Hobbs v. Hull*, 1 Cox, 446.

⁴ *Hyde v. Price*, 3 Ves., 442.

the Master of the Rolls said, "the question is, whether this woman can alienate the property appropriated and destined by her husband for her separate maintenance. It is contended that, in a Court of Equity, this deed leaves it in her power to dispose of the property as she pleases, and leave herself without maintenance, and to leave her husband and her trustee responsible for her maintenance. It is contended that, though the husband is compellable by law to maintain his wife, as every husband is, he cannot appropriate a sum of money for her maintenance without putting it in her power to alienate it, and divert it from the purpose to which he appropriated it. But such was clearly not the intention of the husband, and a deed of separation did not in any sense make the wife a *feme sole*, therefore she had no power over the property to dispose of it. She had only a special trust upon it.

SECTION VI. LIABILITY OF TRUSTEES FOR COSTS.

Whether trustees are to be charged with costs in any given case, is a question peculiarly within the discretion of the court, which will be governed by the particular circumstances of each case. If the suit is between trustees and strangers to the trust, the liability to costs will ordinarily be governed by the general rule which throws the costs of suit upon the unsuccessful party. Hence, if a trustee who succeeds in a suit is entitled to costs from his adver-

sary, so, if he fail in his suit, he must pay costs.¹ In England, prior to the statute 3 and 4 Wm. 4, chap. 42, at law executors and administrators, were not liable to costs when plaintiffs, upon a nonsuit or verdict, where the action was brought upon a contract entered into by the testator or intestate, or for a wrong done in his lifetime.² But by such statute it is provided, that "in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a Judge of any of the said Superior Courts shall otherwise order, be liable to pay costs to the defendant in case of being non-suited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner."³

In the construction of this statute, it has been held that the act has put executors and administrators, when plaintiffs, on the same footing as other plaintiffs, as to their liability for costs, unless where the court sees that they have been misled by some misconduct on the part of the defendant. There-

¹ Hill on Trustees, 551; but see 2 Williams' Ex'ors, 1718; but see, *contra*, Justices v. Haygood, 20 Geo., 847; Williams v. Mattocks, 3 Vt., 189; Roosevelt v. Ellethorp, 10 Paige, 415.

² 2 William's Ex'ors, 1718; Jones v. Williams, 6 M. & S., 178; Barnard v. Higdon, 3 B. & A., 213; S. C., 1 Chit. Rep., 628; Woolley v. Sloper, 9 Bing., 754.

³ Stat. 3 and 4 William IV., chap. 42, sec. 31.

fore, it is not a sufficient claim for relief, that the action was brought *bona fide*, with apparently reasonable grounds for suing, and that plaintiff was taken by surprise by the defence.¹ When executors or administrators are defendants, the costs follow the ordinary rule, and they will become personally liable when there are no assets.²

In New York the common law rule has been extended by statute. It is provided³ that "in all actions and proceedings in which the plaintiff would be entitled to costs upon a judgment rendered in his favor, if, after the appearance of the defendant, such plaintiff be non-suited, discontinue his suit, be *non-prossed*, or judgment pass against him on verdict, demurrer or otherwise; or in case a plaintiff recovers judgment, but not a sufficient sum to entitle him to any costs; the defendant shall have judgment to recover against such plaintiff the full costs of the court in which the action shall be, which shall have the like effect as all other judgments. But such provision shall not extend to give a defendant costs against executors or administrators, necessarily prosecuting in the right of their testator or intestate, unless upon special application, the court shall award costs against them for wantonly bringing any

¹ 2 Williams' Ex'ors, 1719, and authorities cited; see also Redmayne v. Moon, 36 Eng. L. & Eq. Rep., 124.

² Jamison v. Lindsay, 1 Bail., (S. C.,) Rep., 79; Buckels v. Carter, 6 Rich., 106; Hanson v. Jacks, 22 Alab., 549; Farrier v. Cairnes, 5 Ohio, 45; Capperton v. Callison, 1 J. J. Marsh., 396; Harrison v. Warner, 1 Blackf., 385; Ketchum v. Ketchum, 4 Cowen. 87.

³ 2 R. S., 615, sec. 16, 17; see Finley v. Jones, 6 Barb. S. C., 229; see also in Georgia, Justices v. Haygood, 20 Geo., 847.

suit, or for unnecessarily suffering a non-suit, or *non-pros*, or for bad faith in bringing or conducting the cause." So, also, in equity, the rule is to allow executors and trustees their costs in actions with strangers, where they have acted in *good faith*,¹ though otherwise when the suit is groundless and vexatious. The same is also held to be the law in Vermont,² in Kentucky,³ and formerly in Virginia.⁴ In Alabama, it is held that a guardian needlessly bringing suit is liable for costs, but not otherwise.⁵

Where the executor comes into equity *to aid his defence at law*, the rule has been held to be different from that which allows them their costs in equity.⁶

In New Hampshire, where executors brought an action, alleging themselves to be seised of real estate of the deceased as executors, and that the tenant dis-seised them, it was held that judgment against them for costs was properly rendered *de bonis propriis*.⁷

¹ *Moses v. Murgatroyd*, 1 Johns. Ch. Rep., 473; *Arnoux v. Steinbrenner*, 1 Paige, 82; *Rosevelt v. Ellithorp*, 10 Paige, 415; *Dyer v. Potter*, 2 Johns. Ch. Rep., 152.

² *Williams v. Mattocks*, 3 Vt., 189.

³ *Beauchamp v. Davis*, 3 Bibb., 711; *Garner v. Strode*, 5 Litt., 314.

⁴ *Long v. Israel*, 9 Leigh, 556. But the rule has been changed by statute, and executors are made liable. 2 Lomax Ex'ors, 38.

⁵ *Alexander v. Alexander*, 5 Alab., 517; *Savage v. Dickinson*, 16 Alab., 260; see also *Reynolds v. Carter*, 32 Alab., 444.

⁶ *Boughton v. Phillips*, 6 Paige, 334; *Williams v. Harden*, 1 Barb. Ch., 298; *Manny v. Phillips*, 1 Paige, 472; *ex parte Croxton*, 5 DeG. & Sm., 432; *Mumper's Appeal*, 3 W. & S., 443; *Gage v. Rogers*, 1 Strob. Eq., 370; *Capehart v. Huey*, 1 Hill's Eq., 405; *Gouverneur v. Titus*, 1 Edw. Ch., 477; *Knox v. Pickett*, 4 Desau., 92; *Delafield v. Coldon*, 1 Paige, 139; *Collins v. Hoxie*, 9 Paige, 81; *Day v. Day*, 2 Green's Ch., 549; *Miles v. Bacon*, 4 J. J. Marsh, 468; *Peyton v. McDowell*, 3 Dana, 314; *Marton v. Barrett*, 22 Maine, 257.

⁷ *Moulton v. Wendell*, 37 N. H., 406.

In California executors and administrators are individually responsible for costs recovered against them in every case: but by statute, they are to be allowed them in their accounts, except when it appears that the action has been prosecuted or resisted without just cause.¹

In Alabama, where it is provided by statute that a creditor of the estate, who does not present his claim to the executors or administrators, &c., shall not recover costs in an action on the same, it is held that the defendant, executor, or administrator, who intends raising that question of presentation on trial, must present it upon the record by plea or suggestion, that the plaintiff may have an opportunity of proving it, and that such issue must be tried by a jury: and that in case no such plea or suggestion is made, and the plaintiff has a general verdict on the issue joined, he is entitled to full costs against the defendants.²

In North Carolina, in suits against executors and administrators for the settlement of estates and the payment of legacies, it is usual to direct the costs to be paid out of the administration fund, yet, where the estate is small, and the executor has made the costs by relying on an unreasonable objection, he will be decreed to pay them personally.³

In South Carolina, where an executor or admin-

¹ *Hicox v. Graham*, 6 Cal., 167.

² *Wallace v. Nelson*, 28 Alab., 282; see similar provision in New York, 2 R. S., 90, sec. 41; *Potter v. Entz*, 5 Wend., 74; *Belden v. Knowlton*, 3 Sand., 758; *McCann v. Bradley*, 15 How. Pr. Rep., 79; but see *Lemen v. Wood*, 16 ib., 285.

³ *Benick v. Bowman*, 3 Jones Eq., 314.

istrator brings an action in which he need not name himself in his representative character, and he fails in such action, he is to pay the costs.¹

Where trustees are necessarily made parties to suits, either as plaintiffs or defendants, from the office they hold as trustees, or from their interest in the trust property, they will be entitled to their costs, unless guilty of some act of omission or commission, which has induced the necessity, or increased the amount of costs; which will be determined by the discretion of the court.²

In suits between trustees and *cestuis que trust*, where there is a fund under the control of the court, it is a general rule, that trustees shall have their costs, as a matter of course, out of that fund, unless they have forfeited that right by misconduct.³ But where a suit is occasioned solely by the misconduct or neglect of the trustee, the general rule is that the decree against him will be made with costs, to be paid by him personally,⁴ and it will make no difference whether the trustees are a corporation or private individuals.⁵ Fraud is looked upon with

¹ Carter v. Estes, 11 Rich. Law, 363.

² Barlle v. Wilkin, 8 Sim., 238; Brown v. Lockhart, 10 Sim., 426; Greyton v. Shane, 7 Dana, 498; Hicks v. Wrench, 6 Madd., 93; Bennett v. Biddles, 10 Jur., 534; Atcheson v. Robertson, 4 Rich. Eq., 44; Pell v. Ball, Spears' Eq., 48.

³ Att. Gen. v. City of London, 1 Ves., Jr., 246; Taylor v. Glanville, 3 Mad., 176; Curties v. Candler, 6 Madd., 123; Coventry v. Coventry, 1 Keen, 758.

⁴ See 3 Dan. Ch. Pr., 51, *et seq*; Fell v. Luthdridge, Barn., 319; Caffrey v. Derby, 6 Ves., 497; Tebbs v. Carpenter, 1 Madd., 308; Crackett v. Bethune, 1 J. & W., 589.

⁵ Att'y Gen. v. Caius College, 2 Keen, 169; Att'y Gen. v. Christ's Hospital, 4 Beav., 73; Att'y Gen. v. Drapers' Co., 4 Beav., 67; Borough of Hertford v. Poor of Hertford, 2 Bro. P. C., 377.

such *odium* in a Court of Equity, that it may be laid down as an axiom of equitable law, that wherever a case of fraudulent dealing is established against a trustee, the costs will follow against him as a matter of course.¹ Thus, where an executor and trustee procured a *cestui que trust* to execute a release of a legacy without any consideration, and upon *false suggestions*, the release was set aside and the trustee ordered to pay the costs of suit.² So, also, where a trustee for the sale of estates, took undue advantage of the confidence reposed in him, in order to purchase them himself, at an under value, and subsequently re-sold them at a considerable profit, he was decreed to account for the profits, and pay costs, etc.³

Upon the same principle, where a trustee having a *personal* interest in the trust estate, filed a bill bringing the *cestuis que trust* before the court for the purpose *merely* of having a point relating to his *own* interest determined at the expense of the trust, he was decreed to pay the whole costs of the suit for such improper conduct.⁴

So, also, where trustees are guilty of a breach of trust, in general, they will be required to pay the costs of suit to repair such breach, however innocent may have been their intentions;⁵ and where

¹ Hill on Trustees, 558; *Hardwick v. Vernon*, 14 Ves., 504; *Ayliff v. Murray*, 2 Atk., 61.

² *Horsely v. Chaloner*, 2 Ves., 83, and in Supplement by Bell, 281.

³ *Fox v. Mackreth*, 2 Bro. C. C., 400, 406; *Whichcote v. Lawrence*, 3 Ves., 740; *Saunderson v. Walker*, 13 Ves., 601.

⁴ *Hinley v. Phillips*, 2 Atk., 48.

⁵ *Byrne v. Norcott*, 13 Beav., 336, and *Drosier v. Brereton*, 15 Beav., 221; *East v. Ryal*, 2 P. Wms., 284.

a decree is rendered against them, because they have neglected to sue for and recover a debt due the trust estate, in consequence of which the debt was lost, the costs of suit were given against them as a matter of course, although there was no corruption.¹

Where trustees have made an improper investment of the trust fund, by placing it out on personal security, or in any other manner not authorized by the practice of the court, or by the terms of the trust instrument, they will be liable to replace the fund with costs.² So, also, where trustees unnecessarily retain balances in their hands without making proper investments,³ or where they refuse or neglect to account, and suit is brought to compel them to do their duty, they will usually be charged with costs.⁴ But the mere fact that an executor has neglected to render accounts when requested, will not of itself make him liable for costs.⁵ In these cases the court will exercise a sound discretion, and if it appear that the *cestui que trust* demanded more than he was entitled to receive, and the executor submitted to the discretion of the court, he

¹ Fenwick v. Greenway, 10 Beav., 412; Byrne v. Norcott, 13 Beav., 336; Caffrey v. Darby, 6 Ves., 488.

² Pocock v. Reddington, 5 Ves., 794; Challan v. Shippam, 4 Hare, 555; Jones v. Foxhall, 15 Beav., 388.

³ Seers v. Hind, 1 Ves., Jr., 294; Piety v. Stace, 4 Ves., 620; Roche v. Hart, 11 Ves., 58; Mosely v. Ward, 11 Ves., 581; Ashburnham v. Thomson, 13 Ves., 402.

⁴ Collyer v. Dudley, T. & R., 271.

⁵ White v. Jackson, 15 Beav., 191; Robertson v. Wendell, 6 Paige, 322; Minuse v. Cox, 5 Johns. Ch. Rep., 451; Dunscomb v. Dunscomb, 1 Johns. Ch. Rep., 508; Smith v. Smith, 4 Johns. Ch. Rep., 445.

will be entitled to his costs.”¹ But a mere offer by an executor to account, accompanied by a denial that anything was due, will not excuse him from costs.²

A trustee is expected to act, in respect to the duties of his office, in *good faith*, without obstinacy or caprice; and while so acting, the court will, as far as possible, protect him; but where the trustee, from obstinacy or capriciousness, refuses to act in the proper discharge of his duty, he will be charged with costs in a suit brought to compel his action.³ Thus, where a bill for the specific performance of an agreement was made necessary by the refusal of a trustee to join in the conveyance, he was decreed to pay all the costs of suit.⁴ So, also, where a surviving trustee of a will refused to convey the legal estate to the person beneficially entitled, upon some unfounded objection to his title, he was decreed to convey and pay costs.⁵

Where the litigation arises from the neglect of the trustee to keep proper accounts, and from his misapplication of the funds, he is chargeable with the costs.⁶

In Chancery, costs do not depend upon any statute, nor absolutely upon the event of a cause.

¹ *Dunscomb v. Dunscomb*, 1 Johns. Ch. Rep., 508, and see *Minuse v. Cox*, 5 Johns. Ch. Rep., 451.

² *Rogers v. Rogers*, 3 Wend., 503.

³ See *Moor v. Prance*, 9 Hare, 299; *Curtis v. Robinson*, 8 Beav., 242; *Brinton's Estate*, 10 Barr, 408.

⁴ *Jones v. Lewis*, 1 Cox, 199; see also *Willis v. Hiscox*, 4 M. & Cr., 197.

⁵ *Willis v. Hiscox*, 4 M. & Cr., 197.

⁶ *Spencer v. Spencer*, 11 Paige, 299.

They depend upon conscience, and upon a full view and determination of the whole merits of the case. They rest in sound discretion to be exercised under a consideration of all the circumstances.¹ Hence, questions of costs between trustees and *cestuis que trust* are usually questions of conscience as to what is deemed to be right and just between them. For trustees will not be held responsible on slight grounds, nor generally, where there is evidence of upright intentions.² Thus, it is held, that where an administrator has resisted a claim in good faith, and from a conviction of duty, and where no intentional or wilful default is made to appear, he should not, in general, be charged personally with costs.³ So, also, executors and other trustees, who have acted fairly, or who have resisted in good faith, merely by way of submission, shall have their costs out of the fund.³ So, where an executor or administrator has brought a wrong action by mistake, or has ascertained that it will be useless to proceed in consequence of facts subsequently discovered, he will be permitted to discontinue without costs, as well before as after the hearing.⁴ So, also, where it is necessary for an executor to ask the aid and protection of the court, as for example, in order to

¹ *Eastburn v. Kirk*, 2 Johns. Ch., 317; *Leonard v. Freeman*, Col. & C. Cases, 491; 2 R. S., 613, sec. 2, (N. Y.)

² *Moses v. Murgatroyd*, 1 Johns. Ch., 473.

³ *Rogers v. Ross*, 4 Johns. Ch., 608; see also 1 Ves., 205, 246; see also *McCammon v. Worrall*, 11 Paige, 99; *Gouverneur v. Titus*, 6 Paige, 347; *Contant v. Catlin*, 2 Sand. Ch., 485.

⁴ *Arnoux v. Steinbrenner*, 1 Paige, 82; see 5 Cow., 14; 4 Cow., 551; 3 Johns., 247.

authorize him to prefer his own demand over others—over which it is entitled to priority—his costs may be charged on the fund;¹ and where it is proper for them to file a bill for the construction of a will, their costs should be charged against the fund.²

On the other hand, their exemption does not extend to cases where they proceed, notwithstanding a plain want of equity.³ Thus, an administratrix, failing on an appeal for her own benefit, after a decision which ought to have been satisfactory, will be charged with costs.⁴ So, where executors litigate in favor of their own private claims, on points of law long settled, they will be decreed to pay costs.⁵ So, where they bring groundless and vexatious suits,⁶ or where a trustee denies the trust, and sets up a claim for his own benefit.⁷ And so, if a trustee misconduct himself in the course of a suit—as setting up an improper defence by insisting wrongfully on a clause of forfeiture against the *cestui que trust*;⁸ or shows a disposition to obstruct and retard justice, by misstating or refusing to deliver proper accounts;⁹ or by stating his ignor-

¹ Decker v. Miller, 2 Paige, 149; Rashley v. Martin, 1 Ves., Jr., 205.

² Wood v. Vanderbergh, 6 Paige, 277; Morrell v. Dickey, 1 Johns. Ch., 153; see 4 Ves., 630.

³ Gar v. Bright, 1 Barb. Ch., 157; Leavitt v. Yates, 4 Edw. Ch., 134.

⁴ Gardner v. Gardner, 6 Paige, 455.

⁵ Manning v. Manning, 1 Johns. Ch., 527.

⁶ Getman v. Beardsley, 2 Johns. Ch., 274; Rosevelt v. Ellithorp, 10 Paige, 415.

⁷ Lemmond v. Peoples, 6 Ired. Eq., 137; Waterman v. Cochran, 12 Vt., 699; and see Spencer v. Spencer, 11 Paige, 159.

⁸ Lloyd v. Spillett, 3 P. Wms., 346.

⁹ Shepperd v. Smith, 2 Bro. P. C., 372; Avery v. Osborn, Barn., 349; Norbury v. Calbeck, 2 Moll., 461.

ance of facts, the truth of which afterwards appears from documents scheduled in the answer;¹ or by concealing evidence relating to the trust.² And so, if the conduct of trustees, during the progress of a suit, occasions needless increase of expense, as where they have embarrassed the proceedings, and rendered it necessary to have other parties brought before the court, by appointing new trustees after the institution of the suit, they have been ordered to pay the extra costs occasioned by such act;³ and where several trustees are involved in a breach of trust, the court gives costs against all without regard to the degree of culpability, on the principle of giving greater security for their payment.⁴ But where there are several co-trustees, and some of them only have been guilty of the misconduct which occasioned the suit, whilst the others have been ready and anxious to discharge their duties properly, the *guilty trustees alone* will be decreed to pay the costs of suit, including the costs of their innocent co-trustees.⁵

Suits against trustees are frequently rendered necessary by circumstances, independent of, and wholly unconnected with any breach of trust, and in such cases the court will meet the justice of the case by apportioning the cost of suit, and will, in general, give the trustees all the costs not actually

¹ Att'y Gen. v. East Retford, 2 M. & K., 35.

² Borough of Hertford v. Poor of Hertford, 2 Bro. P. C., 377.

³ Att'y Gen. v. Clack, 1 Beav. 467; Cafe v. Bent, 3 Hare, 249.

⁴ Lawrence v. Bowle, 2 Phill., 140.

⁵ Webb v. Webb, 16 Sim., 55; Bagot v. Bagot, 10 Law Jour., N. S., Ch., 116.

occasioned by their breach of trust.¹ The rule, as stated by Sir. Thos. Plummer, V. C., is: "If a suit would have been proper, and the executor a necessary party, though he had not misconducted himself, he ought not to pay *all* the costs of such suit, though in the course of the suit it appears that he has misconducted himself; but if the misconduct of the executor was the *sole* occasion of the suit, he ought to pay the costs." ²

The awarding of costs in these cases, in equity, according to the claims of justice in each particular case, and an enlightened discretion, based upon a consideration of all the circumstances, is further illustrated in the following cases: Where a bill was filed by *cestuis que trust* against their trustee, charging him with misconduct in felling timber, and also with an improper investment of a part of the trust funds, and they failed in establishing the first part of their case, but succeeded in proving the other part, and obtained a decree against the trustee for an account of the trust funds misapplied by him, with five per cent. interest, the Master of the Rolls said that it would be injustice to make the defendant pay the whole of the costs, for one part of the bill had failed; and he was, therefore, decreed to pay so much of the cost as related to the breach of trust.³ So, where there was a suit to charge the trustee with the consequences of a par-

¹ Hill on Trustees, 564; see *Fozier v. Andrews*, 2 Jones & Lat., 199; *Sterrett's Appeal*, 2 Penn. Rep., 419.

² *Tebbs v. Carpenter*, 1 Madd., 308; *Cracklet v. Bethune*, 1 J. & W., 589.

³ *Pocock v. Reddington*, 5 Ves., 791.

ticular breach of trust, and also to obtain the direction of the court as to the general administration of the trust, the trustee was allowed the *general costs* of the suit, but charged with so much as had been caused by his breach of trust.¹ And where a plaintiff, in a suit against trustees, enter into any unnecessary evidence, making unnecessary costs, he will be refused so much as he has needlessly made.²

There are a class of cases where the court, in the exercise of a just and sound discretion, will not charge the executor or trustee with costs, neither will they give them their costs; that is, the court will make no order on the subject, but will leave each party to pay their own costs. To this class belong those cases in which the court deems both parties equally interested or equally at fault, and equity adjudges it right to leave the parties, in respect to costs, where it finds them. Thus, where a trustee has accepted the trust, but, without reason, declines to act, and renders a suit for the appointment of a new trustee necessary. In such case he will be refused his costs.³ But where a party has been named a trustee without his sanction, he is justified in taking the opinion of counsel as to his obligation

¹ *Pride v. Fooks*, 2 Beav., 430; see also upon this principle, *Hewett v. Foster*, 8 Jur., 759.

² *Thorby v. Yates*, 1 N. C. C., 469, and *Westover v. Chapman*, 1 Coll., 379, 383.

³ *Howard v. Rhodes*, 1 Keen, 581; *Greenwood v. Wakeford*, 1 Beav., 581; *Porter v. Watts*, 21 Law J. Ch., 211; *Cruger v. Halliday*, 11 Paige, 314; *re Malony*, 2 J. & Lat., 391 *Jones v. Stockett*, 2 Bland, 409.

to execute a deed of disclaimer, and he will be entitled to his costs in so doing.¹

Where a trustee, without sufficient reason, refused to convey or make over the trust property at the request of the *cestui que trust*, and a suit became necessary, he was not allowed his costs,² and such refusal is often a sufficient reason for making the trustee pay costs.³ So where the trustee had refused to convey the legal estate unless certain persons were made parties to the conveyance, and the court decided that those persons were not necessary parties, the trustee was refused the costs of suit, although he acted in good faith, under the advice of a conveyancer of character. The Master of the Rolls said, "the trustee has acted *bona fide* under advice which misled him, but upon which he had reason to rely, from the experience and character of his adviser. It is for the interest of society, that a trustee under such circumstances should not be fixed with costs; but, the adviser who misled him being of his own choice, I cannot give him the costs of suit."⁴ But whether costs will be given in these cases, where the trustee acts in *good faith*, *under the advice of counsel*, is one of conscience, depending upon the peculiar circumstances of each

¹ *Re Tryon*, 7 Beav., 496; see *Gabriel v. Sturgis*, 5 Hare, 97, as to the rule of costs in case of disclaimer; so also in *Benson v. Davies*, 11 Beav., 369.

² *Ellis v. Ellis*, 1 Russ., 368.

³ *Jones v. Lewis*, 1 Cox, 199; *Willis v. Hiscox*, 4 M. & Cr., 197; *Thornby v. Yates*, 1 N. C. C., 438.

⁴ *Angier v. Stannard*, 3 M. & K., 572; but see *Pool v. Pass*, 1 Beav., 600; *contra*, see *Devey v. Thornton*, 9 Hare, 233.

particular case; and no general or universal rule can be applied to them.¹

Where several co-trustees are made defendants in respect to their joint fiduciary character only, they should appear by the same solicitor, and answer and defend together; and if they appear separately, and sever in their defence without any special circumstances requiring that step, they will be allowed only one set of costs.² But two sets of cost will be allowed where there is a sufficient reason for severing; as, where one of the trustees has a personal interest which conflicts with his duty as trustee,³ or where one can admit facts which the others do not believe to be true,⁴ or where they reside at such a distance from each other they cannot join in their defence.⁵

Courts are not eager to punish trustees by depriving them of their costs, and where there are miti-

¹ See *Pool v. Pass*, 1 Beav., 600, where the counsel on each side were consulted and differed in opinion, and the defendant proposed referring it to a third counsel, which was declined. On the other hand, see *Devey v. Thornton*, 9 Hare, 223, where the trustees had unnecessarily raised doubts as to the title of their *cestui que trust*. See also *Boulton v. Beard*, 27 Eng. L. & Eq., 421; *Pell v. Ball*, Spear's Eq., 48.

² *Nicholson v. Faulkner*, 1 Moll., 559; *Gaunt v. Taylor*, 2 Beav., 347; *Aldridge v. Westbrook*, 4 Beav., 214; *Allen v. Thorp*, 13 L. J., N. S., Ch., 5; *Davis v. McNeil*, 1 Ired. Eq., 344; *Farr v. Sheriffe*, 4 Hare, 512; see also *Wiles v. Cooper*, 9 Beav., 298: and if one trustee only is charged with misconduct, the one set of costs will be allowed to the innocent trustees. *Webb v. Webb*, 16 Sim., 55; *Att'y Gen. v. Cumming*, 2 N. C. C., 57, and 2 Y. & C. Ch. Ca., 156; *Young v. Scott*, 1 Jones, Jr., Exch., 71.

³ *Gaunt v. Taylor*, 2 Beav., 346.

⁴ *Gaunt v. Taylor*, 2 Beav., 347.

⁵ *Aldridge v. Westbrook*, 4 Beav., 213; *Dudgeon v. Cormley*, 2 Conn. and Laws, 422; *Wiles v. Cooper*, 9 Beav., 294; *Lewin on Trusts*, 858; *Hill on Trustees*, 553.

gating circumstances, they have been allowed their costs of suit, in which the decree was against them, for a breach of trust; as, where there had been a misapplication of only a *small* part of the fund, and the suit had been instituted for *other purposes*, and there was *no* imputation against the trustee.¹

In suits between trustees and *cestui que trust*, where there is a fund under the control of the court, trustees, as a general rule, are entitled to their costs out of the fund, to be taxed as between *solicitor and client*, and not like ordinary cases, as between *party and party*:² and these are emphatically termed *trustee's costs*. But costs between solicitor and client will not include every charge which a party's own solicitor would be entitled to make against him in his bill; or any charges or expenses which are not strictly speaking "*costs*." Therefore, to include all, the decree should go on to allow the trustee his *charges and expenses*,³ or for *just allowances*.⁴ But in these cases the decree must contain an express direction to tax the cost as between "*solicitor and client*," or they will be taxed in the ordinary way, as between "*party and party*."⁵ Still, if it contain

¹ Fitzgerald v. Pringle, 2 Moll., 534; and see Sammes v. Rickman, 2 Ves., Jr., 36; see also on this principle. Bennett v. Atkins, 1 Y. & Coll., 249; Bennett v. Going, 1 Moll., 529; Taylor v. Tabrum, 6 Sim., 251.

² Amand v. Bradbourn, 2 Ch. Ca., 138; Mohun v. Mohun, 1 Sw., 201; Pride v. Fooks, 2 Beav., 473; Hosack v. Rogers, 9 Paige, 463; Irving v. De Kay, 9 Paige, 533; Minuse v. Cox, 5 Johns. Ch. Rep., 451.

³ Hill on Trustees, 565; Fearn v. Young, 10 Ves., 184. This distinction between costs taxed as between party and party and between solicitor and client, is peculiar to Courts of Equity, and does not exist at law. Hill on Trustees, 566.

⁴ Ibid.

⁵ Fearn v. Young, 10 Ves., 184.

a direction for "*just allowances*," he would be entitled to his *extra* expenses under that head.¹

As those costs taxed between solicitor and client are termed "*trustee's costs*," it follows that they will not be taxed in a case where that relation or character does not exist. Thus, where a person has been named as trustee in an instrument, and is made a party to a suit respecting the trust, and he comes in and disclaims by his answer, and the bill is dismissed, as to him, he will be entitled to his costs, not as between solicitor and client, but only as between party and party; for his own answer shows that he does not fill the character of trustee.² So, also, a consignee or agent, who receives and holds property for the benefit of others, but is not appointed a trustee by deed, in a suit brought by a party having conflicting claims to property in his hands, cannot have his costs as between solicitor and client; but he is in the situation of a plaintiff in a bill of interpleader, who is entitled to costs only as between party and party.³

¹ See preceding note.

² *Norway v. Norway*, 2 M. & K., 278; *Bray v. West*, 9 Sim., 429; *Hill on Trustees*, 566.

³ *Dunlop v. Hubbard*, 19 Ves., 205.

SECTION VII. LIMITATION OF ACTIONS, &c. STATUTES OF LIMITATION.

As between trustee and *cestui que trust*, an express trust, constituted by the act of the parties themselves, will not be barred by any length of time; for in such case there is no adverse possession.¹ And where there are several trustees, the statute will not commence running against the *cestui que trust* as long as any one of the trustees is in possession.²

The principle applicable to express trusts as between trustees and *cestuis que trust* is, that the statute does not begin to run, until there has been some open express denial of the right of the *cestui que trust*, and what amounts to an adverse possession by the trustee;³ and it has been held that even adverse possession must be brought home by notice to the *cestui que trust*.⁴ Lord Justice Knight Bruce, held

¹ Beckford v. Wade, 17 Ves., 97; Wedderburn v. Wedderburn, 4 M. & Cr., 52; Hill on Trustees, 264; see also the Limitation Act, 3 and 4 Will. IV., ch. 27, sec. 25.

² Att'y Gen. v. Flint, 4 Hare, 147.

³ Decouche v. Savetier, 3 Johns. Ch. Rep., 190; Anstice v. Brown, 6 Paige, 448; Kane v. Bloodgood, 7 Johns. Ch. Rep., 90; Bohannon's Heirs v. Sthreshley's Adm'r, 2 B. Monr., 438; Foscue v. Foscue, 2 Ired. Eq., 321; Varick v. Edwards, 11 Paige, 289; Johnson v. Humphreys, 14 S. & R., 394; Finney v. Cochran, 1 W. & S., 118; Pinkston v. Brewster, 14 Alab., 315; Murdock v. Hughes, 7 Sm. & M., 219; Zacharias v. Zacharias, 23 Penn. St. Rep., 452; Smith v. Calloway, 7 Blackf., 86; Oliver v. Piatt, 3 How. U. S., 333; Creigh's Heirs v. Henson, 10 Grat., 231; White v. White, 1 Johns. Md. Ch., 56.

⁴ Fox v. Cash, 11 Penn. St. Rep., 207; Starkie v. Starke, 3 Rich, 438; Zeller's Lessee v. Eckert, 4 How. U. S. Rep., 289; Williams v. First Presb. Soc. 1 Ohio, N. S., 478.

that one who had acquired possession as trustee, would never be permitted to set it up as a beneficial possession in himself; and that it was his duty, if he meant to claim adversely, to give up possession of the estate, and then set his claim afterwards.¹

As the reason that the statute will not begin to run, in cases of express trusts, between the trustee and his beneficiary, is, that the possession of the trustee is the possession of the *cestui que trust*, and consequently not adverse, within the meaning of the statute; it follows that when anything occurs between them which changes their relation to the property, and makes their interests and claims adverse, the statute will commence running. Thus, where there had been an accounting and a delivery of the trust property by the trustee to the *cestui que trust*, while a minor, and a denial of any further liability shortly after he had become of age, it was held that the statute commenced running from that period.² So where a trustee, with the knowledge of his *cestui que trust*, made a conveyance apparently in derogation of his trust, and undisturbed possession was held and improvements were made, during a long period, by the grantee and those claiming under him, during which time no claim was asserted by the *cestui que trust*, it was presumed that, for a sufficient consideration, he directed or acquiesced in the conveyance, and the statute was permitted to run.³

¹ *Stone v. Godfrey*, 18 Jur., 524, and 5 DeG., Mac. & G., 76.

² *Sollee v. Croft*, 7 Rich Eq., 34.

³ *Williams v. The First Presbyterian Society*, 1 Ohio, N. S., 478; see also *Wedderburn v. Wedderburn*, 2 Keen, 749, and S. C., 4 M. & Cr., 52.

So, also, where the relation is terminated by a breach of trust.¹

It is upon the same principle that the statute is permitted to run in cases of resulting or presumptive trusts. In general, the facts out of which such trusts arise, from their very nature, pre-suppose an adverse claim of right on the part of the trustee by implication from the beginning; and the statute will commence to run against the *cestui que trust* from the period at which he could have vindicated his right by action or otherwise, which, in equity, is considered to be when he has, or, with reasonable diligence, could have made himself acquainted with his right.²

But a mere lapse of time of itself, without other proofs, will not be a bar to relief on a constructive trust originating in fraud. The party entitled to relief, must have been aware of his rights, and have acquiesced in being deprived of them; and the statute will not begin to run against him until he has acquired or might, with reasonable diligence, have acquired the knowledge of the fact upon which the trust is founded.³ And, in the case

¹ Wickliffe v. City of Lexington, 11 B. Monr., 161.

² Beckford v. Wade, 17 Ves., 97; Portlock v. Gardner, 1 Hare, 594; Sheppards v. Turpin, 3 Gratt., 373; Murdock v. Hughes, 7 Sm. & M., 219; Prevost v. Gratz, 6 Wheat., 481; Cuyler v. Bradt, 2 Caine's Cas., 326; Strimpfler v. Roberts, 18 Penn. St. Rep., 300; Hallett v. Collins, 10 How. U. S., 174; Phalen v. Clark, 19 Conn., 421; Doggett v. Emmerson, 3 Story, 700.

³ Ryder v. Beckerton, 3 Sw., 81, n.; Blennerrhassett v. Day, 2 Ball & B., 118; Warner v. Daniels, 1 W. & M., 111; Bowens v. Evans, 2 H. & L. Cas., 237; Hallett v. Collins, 10 How. U. S. Rep., 174; Phalen v. Clark, 19 Conn., 421.

of *Michoud v. Girod*,¹ the Court remarked: "We believe no case can be found in the books in which a Court of Equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered, or become known to the party whose rights are affected by it."

In New York it has been decided that by analogy to the Statute of Limitations, twenty years is the shortest period which can bar a proceeding in equity to set aside a conveyance obtained by fraud.²

But when there is no adverse possession, or when there could be no bar at law, it is said there is none in equity;³ and most cases lay down no certain or definite period in which a proceeding in equity for relief will be barred, but leave the question to depend very much upon other circumstances.⁴

Executors and administrators are often trustees for legatees, creditors, and next of kin, consequently the general rule is applicable to them,⁵ though there will be a presumption of payment after a great

¹ 4 How. U. S., 61.

² *Ward v. Van Bokkelin*, 1 Paige, 100; see also this analogy to the statute, *Thompson v. Blair*, 3 Murphy, 593; *Farr v. Farr*, 1 Hill's Eq., 391; *Field v. Wilson*, 6 B. Monr., 479; *Perry v. Craige*, 3 Miss., 525; *Miller v. McIntyre*, 6 Pet., 61; *Bank U. S. v. Biddle*, 2 Par. Eq., 31; *Ferris v. Henderson*, 12 Penn. St. Rep., 54; *Walker v. Walker*, 16 S. & R., 379.

³ *Varick v. Edwards*, 1 Hoff. Ch., 417; *Elmendorf v. Taylor*, 10 Wheat., 176; *Barbour v. Whitlock*, 4 B. Monr., 197.

⁴ See *Bell v. Webb*, 2 Gill., 163; *Rhineland v. Barrow*, 17 Johns. Rep., 538; *Butler v. Haskell*, 4 Desaus., 651; but see *Harrod v. Fountleroy*, 3 J. J. Marsh, 548; *Phillips v. Belden*, 2 Edw. Ch., 1; *Powell v. Murray*, 10 Paige, 256; *Maxwell v. Kennedy*, 8 How. U. S., 210.

⁵ *Lindsay v. Lindsay*, 1 Desaus., 150; *Carr v. Bob*, 7 Dana, 417; *Blue v. Patterson*, 1 Dev. & Batt., 457; *Bird v. Graham*, 1 Ired. Eq., 196.

lapse of time.¹ And, in some of the States, statutes have been passed limiting the time within which they shall be held liable.

But in cases of express trusts accounts have been decreed against trustees extending over thirty, forty and forty-five years.²

It is held that a *cestui que trust* tenant for life may dissiess the trustee by a formal denial and disclaimer of the tenancy; and if he continue to deal with the estate in a manner inconsistent with the subsistence of the trust, he will acquire an adverse possession as against the trustee upon which the Statute of Limitations will operate, so as to vest in him an indefeasible legal estate. But it is extremely difficult to determine at what time such adverse possession on the part of the *cestui que trust* commenced.³ But when the occupancy of the *cestui que trust* as such is not inconsistent with his tenancy, no such adverse possession will be acquired.⁴

So, the legal estate vested in the trustee, together with the equitable interest dependent on it, may be defeated and divested by the disseisin of a stranger, who has no notice of the trust, and the Statutes of

¹ *Bird v. Graham*, 1 Ired. Eq., 196; *Graham v. Davidson*, 2 Dev. & Batt., 155; *Hudson v. Hudson*, 3 Rawle, 117; see *Angel on Limitations*, chap. 16.

² *Beaumont v. Boulton*, 5 Ves., 485; *Townsend v. Townsend*, 1 Cox, 28; *Chalmer v. Bradley*, 1 J. & W., 51; *Att'y Gen. v. Brewers' Co.*, 1 Mer., 495.

³ *Keene v. Deardon*, 8 East, 247; *Earl of Portsmouth v. Lord Effingham*, 1 Ves., 435; *Harwood v. Oglander*, 3 Ves., 131; *Hill on Trustees*, 267.

⁴ *Price v. Blackmore*, 6 Beav., 507, 514.

Limitation will constitute an effectual bar ;¹ and, if the Statute has begun to run, it will not be suspended by the death of the trustee and the failure to appoint a successor, even in the case of an infant.²

But whether the Statutes of Limitation shall or shall not be applied to any given case in equity, would seem to depend more upon the apparent equity of the parties litigating, than upon any very definite rules of general application, at least, so far as the administration of trusts are concerned. Mr. Hill remarks: "On the whole, it must be admitted that the effect of the Statutes of Limitation, as applied to the estates of trustees, is left in a very unsatisfactory state by the authorities, and it is extremely difficult to gather from them any very definite rules of general application."³

¹ *Lewellen v. Mackworth*, 2 Eq. Ca. Abr., 579; *Hovenden v. Lord Annesley*, 2 Sch. & Lef., 629; *Pentland v. Stokes*, 2 Ball. & B., 75; *Elmendorff v. Taylor*, 10 Wheat., 152; *Williams v. Otey*, 8 Humph., 563; *Smilie v. Biffle*, 2 Barr, 52; *Wooldridge v. Planters' Bank*, 1 Sneed, 297; *Worthy v. Johnson*, 10 Geo., 358; *Long v. Cason*, 4 Rich Eq., 60.

² *Wooldridge v. Planters' Bank*, 1 Sneed, 297; see also, as to barring an infant *cestui que trust*, *Worthy v. Johnson*, 10 Geo., 358; *Williams v. Otey*, 8 Humph., 563; *Long v. Cason*, 4 Rich Eq., 60.

³ *Hill on Trustees*, 268.

CHAPTER VI.

POWERS OF TRUSTEES.

SECTION I. DISCRETIONARY POWERS OF TRUSTEES.

No formal set of words is requisite to create or reserve a power. Their creation, execution or destruction all depends upon the substantial intention of the parties; and they are to be construed equitably and liberally, in furtherance of that intention.¹

Where the power, which it is the duty of the party to execute, is put upon him by the testator, and is made his duty by the requisition of the will, and the testator has given him a sufficient interest to enable him to discharge that duty or execute the power, he is a trustee for the exercise of it; and has not a discretion whether he will exercise it or not; and the court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute the power.²

¹ 4 Kent's Com., 319; Lord Mansfield in *Doug. R.*, 293; Lord Ellenborough, 3 East R., 441; *Jackson v. Veeder*, 11 Johns. Rep., 169.

² *Richardson v. Chapman*, 5 Bro. P. C., 400; see *De Peyster v. Clendinning*, 8 Paige, 296; *Brown v. Higgs*, 8 Ves., 561; *Miller v. Meetch*, 8 Barr, 417; *Gibbs v. Marsh*, 2 Metc., 243; *Withers v. Yeaden*, 1 Rich Ch., 324; *Gaskell v. Harmon*, 11 Ves., 507; *Walker v. Shore*, 19 Ves., 392; *Elwin v. Elwin*, 8 Ves., 554; *Gibson v. Bott*, 7 Ves., 94.

Wherever an authority is given to trustees, which is either not compulsory upon them to exercise at all, or if compulsory, the time, manner or extent of its execution is left to be determined by the trustees, it is a discretionary power; and it may be conferred either by the express terms of the trust, or by implication from the nature of the duty imposed upon them.

An express discretionary power is where the trustees are authorized or empowered to act "at their discretion;" or, "if they should think fit," "proper," etc. Thus, in the case of *Kemp v. Kemp*,¹ the executrix, after giving several specific and pecuniary legacies, gave the residue to her cousin, Martha Kemp, for life, and then to be disposed of *among her children as she shall think proper*. Martha Kemp and her son Anthony Facer Kemp, were appointed executors. The fund which was thus the subject of her appointment among her children was about £1,900. Martha Kemp, by her will, appointed said fund in the manner following; "I give, bequeath, and dispose, unto my son Anthony Facer Kemp the sum of £50 thereof. I give, bequeath, and dispose unto my daughter, Martha Searcombe, the wife of Richard Searcombe, the sum of £10, other part thereof, to and for her own sole and separate use and benefit absolutely; and, as to all the rest, residue and remainder, of such goods, chattels, estates and effects, and of what nature or kind soever, I give, bequeath and dispose of the

¹ *Kemp v. Kemp*, 5 Ves., 849.

same, and every part and parcel thereof, unto my son, Samuel Scattergood Kemp, to and for his own use and benefit forever; and she appointed Samuel Scattergood Kemp her sole executor, leaving only the three children mentioned in her will.

The question arose whether the appointments made by the appointor were in pursuance of the power "to dispose of, &c., among her children as she shall think proper." The Master of the Rolls held that the language of the power was not *large enough* to enable the trustee to give the *whole* sum to *one* of her children only, consequently she was bound to give each one a substantial portion of the £1,900.¹ Said the Master, Sir R. P. Arden, the property is pretty nearly £1,900. I should hardly have considered that £50 could be considered a *substantial* part; but the sum of £10 to the daughter was evidently meant to be no gift; the mother merely supposing herself to be under the necessity of giving *something* to each.

The Master of the Rolls thought, that had the testatrix said, "to *such* of her children as she may think proper," the language would have been large enough to have authorized the giving of the *whole* to *one* of her children to the exclusion of the others. He said, in *Spring v. Biles*,² the words were "to and amongst *such* of my relations as shall be living at the time of my decease, in such parts, shares and

¹ *Kemp v. Kemp*, 5 Ves., 849; *Alexander v. Alexander*, 2 Ves., 640; *Coleman v. Seymour*, 1 Ves., 209; *Haynesworth v. Cox*, 1 Harp. Eq., 119, and note.

² *Spring v. Biles*, 1 T. R. B. R., 435, note.

proportions, as my wife shall think proper.” The Judges were of the opinion that these words gave full power to give to one or more ; and most of the cases that have arisen upon words of this sort are there quoted, as, *Thomas v. Thomas*,¹ where the words were “to one or more of his children;” *Tomlinson v. Dighton*,² where it was “to any of his children;” *Macey v. Shurmer*,³ “amongst all or such of his children;” and *Liefe v. Saltingstone*,⁴ to “such of my children.” All these words were held, and very properly, to show a manifest intention to give a power to appoint to any *one* child that should answer the description. “But,” said the master, “it does not appear to have been argued, at least not conceded, that the word ‘amongst’ has not been considered equivalent to ‘all’ ‘every,’ which words are mendatory, and make it necessary that each should share.”

It is to be noticed that the Master of the Rolls decided that from the language of the power, the donor intended that *each child* of the appointor, should be an *appointee* ; and, consequently, an illusory appointment would not be in compliance with the manifest intention of the donor ; who, if she intended anything for each child, must be presumed to have intended for each a *substantial part* of said £1,900. And as the appointments in this case, as to one of the appointees at least, were illusory, and

¹ *Thomas v. Thomas*, 2 Vern., 513.

² 1 P. Wms., 149.

³ *Macey v. Shurmer*, 1 Atk., 389.

⁴ 1 Mod., 189; 2 Lev., 104; *Carter*, 232.

not designed as an execution of the power, it was therefore void.¹

Thomas Longmore by will gave and bequeathed all his personal estate, of what nature and kind soever, to his executors, upon trust, and subject to the payment of his debts, to pay, apply and dispose of his said personal estate "unto and amongst his two brothers Joseph and Benjamin, and his sister Hannah, or their children, in such shares and proportion, and at such time or times as they, his trustees, or the major part or the survivor of them, his executors or administrators shall, in their discretion, think proper.

The executors, not having made any disposition of the whole, but having made some payments to the brothers and sister, the bill was filed by Benjamin to have the accounts taken and the residue divided as the court should direct. By a decree made in February, 1798, the accounts were directed; and by another decree in February, 1802, an inquiry was directed as to the balances in the hands of the executors from year to year, and what children the plaintiff and his brother Joseph and sister Hannah had at the death of the testator; and if any were dead, who were their representatives. The facts having been ascertained, Sir William Grant, M. R., held, that a discretion was vested in the executors to say to whom the fund should go, to the parents or to the children. But not having exercised their power of appointment, it

¹ *Kemp v. Kemp*, 5 Ves., 861.

devolved upon the court, which had not that discretion; but could only say to *what class* it belonged, or what class should take and then divide the fund *equally* between the members of that class.¹ In this case, the court held that the fund should be distributed to the parents and all the children living at the death of the testator, and to the representatives of such as had since died.

In this case, the Master of the Rolls construed the word “or” as “and,” under the rule that in the construction of wills, “the copulative ‘and’ may be construed by the disjunctive ‘or,’ and *vice versa* provided such construction appear necessary to give effect to the testator’s intention.”²

And here is illustrated another principle in the execution of discretionary powers. A discretionary power as to the *proportions* in which a testator’s bounty shall be distributed amongst his next of kin, may be given to his executors; but if the execution of the trust devolve upon the court, no such power of discretionary distribution or selection can be exercised. The statute of distributions affords the only rule of selection which the court can adopt in such cases; and if the testator’s bequest was to be divided, not amongst a family, but amongst certain

¹ Longmore v. Broom, 7 Ves., 128.

² Maberly v. Strode, 3 Ves., 450; Longmore v. Broom, 7 Ves., 128; Horridge v. Ferguson, 1 Jac., 583; Thackery v. Hampsen, 2 Sim. & Stu., 214; Markhouse v. Markhouse, 3 Sim., 126; Mills v. Dyer, 5 Sim., 435; and “and” may be construed “or,” Maberly v. Strode, *ut supra*; Bell v. Phyn, 7 Ves., 124; Newman v. Nightingale, 1 Cox, 341; see Jackson v. Blausham, 6 Johns. Rep., 54; Haven v. Streets, 2 Binn., 532; Holmes v. Holmes, 5 Binn., 252.

named or described individuals, at the discretion of the trustees as to their respective shares, the court, if called upon to act, must make an *equal* distribution amongst them all.¹

When the execution of a will giving bequests to the testator's "relations," devolves upon the court, in such cases, the court, for convenience alone, follow a rule based upon the statute of distribution, for the purpose of determining *who* are entitled to the bequest.² But a reference to the statute of distribution will not be necessary, when the testator has himself so qualified his bequest as to relations, as to define what description of relations he meant; and restraining it to such particular objects, as, "to my *poor* relations." In such cases the gift has been extended to all who were poor, although they stood in different degrees of relationship.³ So, also, it has been held, that there is no uncertainty in a bequest to "nearest relations," making a reference to the statute of distribution necessary.⁴

The principle involved in these discretionary trusts, in their creation, arises from the fact that sometimes, a person having property or money to dispose of, intrusts its disposition, or the *mode* of its

¹ See *Longmore v. Broom*, 7 Ves., 128; *Brown v. Higgs*, 4 Ves., 708; *Mogridge v. Thackwell*, 1 Ves., 464; *Walker v. Walker*, 5 Mad., 426; *Brandon v. Brandon*, 3 Swanst., 319; *Cruwys v. Coleman*, 9 Ves., 324; *Cole v. Wade*, 16 Ves., 47.

² *Cruwys v. Coleman*, 9 Ves., 324; *Cole v. Wade*, 16 Ves., 47.

³ *Crossley v. Clare*, 3 Swanst., 323; *Bruusden v. Woolridge*, Amb., 507; *White v. White*, 7 Ves., 423; and see *Isaac v. De Friez*, stated from Req. Lib., in note to 17 Ves., 733.

⁴ *Smith v. Campbell*, 19 Ves., 400; *Brandon v. Brandon*, 3 Swanst., 319; *Stump v. Cook*, 1 Cox, 236.

disposition, or the *time* of doing it, to the judgment and discretion of another; because of the confidence he has in their ability to do better than he with his *then* present information, is capable of doing. Where he makes that discretion absolute in the donee, not only as to *the time, the manner and the objects*, but as to the *trust* itself, equity will not interfere to raise a trust.¹ But if there is, connected with such gift or grant, a use clearly indicated, either for the donor, grantor, or a third party, equity will raise a trust and enforce it. The intention of the donor or grantor, in making the gift or grant, is binding upon the conscience of the donee; and where that intention can be clearly ascertained, there is, usually, little difficulty in carrying it into effect.² A mere power is not imperative, but leaves the action of the party receiving it, to be exercised at discretion. The donor or grantor, having full confidence in the judgment and integrity of the party, empowers him to act according to the dictates of that judgment, and the promptings of his own heart. A trust is *imperative*, and is created with strict reference to its faithful execution. But cases arise which do not seem to belong to the one or the other of these classes. In the language of Lord Eldon, there is not only a *mere power* and a *mere trust*, but there is likewise known to the court,

¹ 2 Fonb. Eq., B. 2, ch. 2, sec. 4, note (x); *Mason v. Jones*, 3 Edw. Ch., 497; *Champlin v. Champlin*, 3 Edw., 571; *Leggett v. Hunter*, 19 N. Y., 445.

² *Collins v. Carlisle*, 7 B. Monr., 14; *Errickson v. Willard*, 1 N. H., 217; *Bull v. Bull*, 8 Conn., 47; *Withers v. Yeadon*, 1 Rich Eq., 324.

a power with which a party is entrusted and is required to execute.¹ Such cases arise where the donor has entrusted the party with money or property to be used according to his judgment or discretion, for the use of certain persons, or for a class of persons; but nevertheless, to be used for others than himself. The discretion of the trustee is not absolute, but confined to the *time*, *the manner*, or the *particular* individuals of a class.²

The principles by which it is determined whether a trust is raised in connection with discretionary powers, are: 1. Are the words in respect to any part of the power to be exercised, *imperative*, as distinguished from optional or discretionary; 2. Is the subject of the trust *certain*, so that the court may know to what it attaches; and, 3. Are the objects of the trust sufficiently designated, that the court may know for whose benefit it is intended. Thus, a testator devised his real estate and negroes to his son G. W., in trust, 1. To apply the rents, issues and profits to the use of himself and family, and the education of his children; 2. He empowered him to give or devise, by deed or will, the said property, and the rents, issues and profits thereof, over and above what he should apply to the uses aforesaid, unto all or any child or children by him begotten or to be begotten, in such a way and man-

¹ *Brown v. Higgs*, 8 Ves., 570; *Story's Eq. Jur.*, sec. 1061; *Richardson v. Chapman*, 5 Bro. P. C., 400; see 1 *Pow. on Dev.*, 294, *Jarman's note*; *Sugd. on Pow.*, ch. 6, sec. 3, p. 393, ante, 210.

² *Hoey v. Kenney*, 25 Barb., 396; 1 *Rev. St.*, (N. Y.), 734, sec. 100; see also *Brest v. Offley*, 1 *Ch. Rep.*, 246.

ner, and in such proportions, and for such uses, estates and interests as he shall see fit and proper.”

G. W. died, leaving a will, by which he devised the whole of his estate to his wife, with directions that his executors (his wife and sons) should act under his father's will, in trust, and in every respect and manner intended by their grand-father. It is to be noticed in determining the character of the first devise and bequest, 1. That the estate was given to G. W. *in trust*; 2. That he was invested with discretionary powers to determine who of a certain class were to be the particular objects of such trust: and also, *when, how*, in what proportions, and with what estates, they were to be invested; but, 3. The discretion of G. W. did not extend to the trust itself; that was imperative. Therefore the court held, 1. That the legal estate was in G. W., coupled with a power in trust to appoint, at his discretion, among his children; 2. That the power could not be delegated; and, 3. That as G. W. had neglected to exercise the power, his children were entitled to divide the property equally.¹

In another case² a widow, upon her second marriage, settled a fund, in trust, for her own separate use for life, and declared that subject thereto, the fund should, *as and when* she should think fit, or be advised, be settled in trust for the benefit of A., her

¹ Withers v. Yeadon, 1 Rich Eq., 324; see Collins v. Carlisle's Heirs, 7 B. Monr., 14; Bull v. Bull, 8 Conn., 47; Gilbert v. Chapin, 19 Conn., 351; Harper v. Phelps, 21 Conn., 257.

² Croft v. Adam, 12 Sim., 639.

unmarried daughter, by her first husband, and her daughter's intended husband, and their children, in such manner and for such rights and interests as should be agreed upon, either previous to or after the marriage of A., with her consent; and she, the widow, should be at free liberty, and have full power and authority to settle the fund or any part of it in trust for the immediate benefit of her daughter and children. But if her daughter should not be married in her mother's lifetime, then the trust should be for the daughter's benefit, and a vested interest in her at *twenty-one*, with a trust over on the death of the daughter, without marrying, in the lifetime of the mother.

In this case the trust was declared subject to the use of the mother for life; and also subject to certain discretionary powers of the settler, extending to the *time*, the *manner*, etc., of its enjoyment; but not extending to the trust itself. Therefore it was held by the Vice Chancellor that there was a trust for the daughter, her husband and their children, subject to certain modifications of their interest, by the mother, had she seen fit to have exercised the power. Thus a trust will be raised under a power, where the discretion does not extend to the trust itself, and where the subject and object of the trust are sufficiently certain to enable the court to execute it according to the manifest will of the testator.¹

When discretionary powers have been committed

¹ McNeilledge v. Galbraith, 8 S. & R., 43; Withers v. Yeadon, 1 Rich Eq., 324; Hunter v. Stembredge, 12 Geo., 192; Steele v. Levisay, 11 Gratt., 454.

to trustees, and they have failed to exercise them during their lifetime; or where they have declined to act, the power is gone; for it is now well settled that the court will not exercise a mere discretionary power.¹ But there is an exception, however, to this general rule in the case of a public charity; for the court, upon the death or refusal of the trustees to accept, will exercise a discretionary power of administering a charity estate, by virtue of its general jurisdiction to govern and regulate charities.² The principle by which courts undertake the exercise of a discretionary power in the case of charity, is laid down thus: "*Charity is the essence and substance, and the mode only a shadow;*" therefore the court will entrust itself with the exercise of a discretion which has been personally entrusted to another, rather than the essence or substance shall fail. And again, "the substance of the charity remains, notwithstanding the death of the trustee before the testator, and though at law it is a lapsed legacy, yet in equity it is subsisting, &c."³

But this doctrine, that the court will entrust itself with the execution of a discretionary power which is given personally to another, is repudiated

¹ *Kemp v. Kemp*, 5 Ves., Jr., 849, 859; *Keates v. Burton*, 14 Ves., 437; 2 Sugd. on Pow., 190, (6th ed.); *Beekman v. Bonsor*, 23 N. Y. Rep., 303, 305.

² *Hill on Trustees*, 486; *Moggridge v. Thackwell*, 7 Ves., 80; *Att'y Gen. v. Hickman*, 2 Eq. Ca. Abr., 193; *Gower v. Mainwaring*, 2 Ves., 89.

³ 7 Ves., 80, *ut supra*; see *Going v. Emery*, 16 Pick., 107; *Bartlet v. King*, 12 Mass., 537; *Burbank v. Whitney*, 24 Pick., 146; *Nye v. Bartlet*, 4 Metc., 378; but see *Beekman v. Bonsor*, 23 N. Y. Rep., 305.

in New York. In the case of *Beekman v. Bonsor*,¹ where the testator had made a gift to charity, and had intrusted his executors with large discretionary powers, in the direction and management of the trust, which powers were personal to them, the Court of Appeals held that the executors having renounced the trust, the power was gone; that being personal in character it could not be exercised by others. That even an administrator, *cum testamento annexo*, could not exercise such discretionary powers, although their statute provides, that "in all cases where letters of administration with the will annexed shall be granted, the will of the deceased shall be observed and performed, and the administrators with such wills shall have the same rights and powers, and be subject to the same duties as if they had been named executors in such wills."¹

Not only will a court of equity not assume the exercise of a discretionary power vested in trustees, where they have renounced the trust, or have died without the exercise of it, but they will not interfere with the exercise of a discretionary power, while trustees are acting in good faith and with ordinary prudence.² But equity will require the

¹ *Beekman v. Bonsor*, 23 N. Y. Rep., 303, 304, and 2 R. S., 72, sec. 22; *Conklin v. Edgerton*, 21 Wend., 430; *Wills v. Cowper*, 2 Hammond, 124; but see *Peebles v. Watts*, 9 Dana, 102; *Steele v. Morley*, ib. 139; *Brown v. Armistead*, 6 Rand., 594.

² *Potter v. Chapman*, Ambl., 98; *French v. Davidson*, 3 Mad., 396; *Pink v. De Thuissey*, 2 Mad., 157, 162; *Clark v. Parker*, 19 Ves., 11; *Morton v. Southgate*, 28 Maine, 41; *Littlefield v. Cole*, 33 Maine, 552; *Arnold v. Gilbert*, 3 Sandf. Ch., 556; *Mason v. Mason*, 4 Sandf. Ch., 623; *Hawley v. James*, 5 Paige, 485; *Leavitt v. Beirne*, 21 Conn., 2; *Cowles v. Brown*, 4 Coll., 477.

exercise of good faith on the part of the trustee in executing discretionary powers committed to him, and will entertain a bill filed by a party in interest to ascertain whether the discretion has been or is being properly exercised. Thus, where there was a direction in the will that the testator's widow should receive "all the income of his real and personal estate, and pay and apply the same to and for the use of herself and the children of their marriage, agreeably and according to her own discretion," which it was claimed the court could not interfere with so long as the discretion was reasonably and honestly exercised, Vice Chancellor Wigram held that one of the children having an interest subject to the discretion of the mother, had a right to a discovery of the property in respect of which the interest existed, and also to the discovery of all the acts which had been done, and the reason for doing them, which the mother might be able to give. The plaintiff had this right, in order that the court might be able to see whether the discretion exercised by the party defendant, the mother, was within the limits of a sound and honest execution of the trust. And the Vice Chancellor further remarked, that when a bill was filed the court would look into it of course, and inquire into the acts which had been done in the administration of the trust, and possibly might require the trustee to exercise the discretion under view of the court.¹

¹ *Costabadie v. Costabadie*, 6 Hare, 410; *French v. Davidson*, 3 Mad., 396; *Dashwood v. Lord Bulkley*, 10 Ves., 245; *Clark v. Parker*, 19 Ves., 12, 18; *Norcum v. D'Ench*, 2 Benn. Mo., (17 Mo.,) 98; see remarks per

It is a general rule, that discretionary powers must be exercised in the manner prescribed in the trust instrument. If they are to be exercised by will, an execution by deed will not answer; and *vice versa*; and they must be executed according to the substantial intention and purpose of the party creating them; and equity, in the construction of such powers, will not restrain and lessen them, by a narrow and rigid interpretation, nor extend them by a loose and general surmise as to what was intended should be performed. They are to be construed equitably, and the general intention must be carried into effect as far as possible.¹

In accordance with the above principles, these discretionary powers can be exercised only by those persons to whom they are committed, or in whom they are confided by the trust instrument; consequently they will not devolve upon the heir or personal representatives of the original trustee, as an act of law; and only in cases where they are so limited on the creation of the trust.² In the case of *Cole v. Wade*,² the Master of the rolls laid down the rule thus: "Wherever a power is of a kind that indicates a personal confidence, it must *prima facie* be understood to be confined to the individual to

Thompson, C. J., in *Jackson v. Veeder*, 11 Johns., 169, 171; *Cloud v. Martin*, 1 Dev. & Batt. L. R., 397; *Haynesworth v. Cox*, Harp. Eq., 117; *Lippencott v. Ridgway*, 2 Stockt. Ch., 164; *Melvin v. Melvin*, 6 Md., 530.

¹ Hill on Trustees, 488; *Alyn v. Belcher*, 1 Eden, 132, and 1 Lead. Ca. Eq., 304, and Am. notes; 4 Kent's Com., 330.

² *Cole v. Wade*, 16 Ves., 44; *Osgood v. Franklin*, 2 Johns. Ch., 19; *Peter v. Beverly*, 10 Peters' Rep., 533; *Doyley v. Att'y Gen.*, 4 Vin., 485; 2 Eq. Ca., 6, 194; 7 Ves., 58, n.; Sugd. on Pow., 145; *Eaton v. Smith*, 2 Beav., 236.

whom it is given; and will not, except by express words, pass to others to whom, by legal transmission, the same character may happen to belong.¹

Under this rule, if the power be given to particular persons *by name, without adding words of survivorship*, the power will be gone upon the death of one of the parties named.² But if it be given to them *as a class of persons*, as to "my trustees," "my sons," etc., and not by their proper names, the authority will survive, while the plural number remains;³ and when executors are donees of the power, it may be exercised by a *single* surviving executor.⁴ It is held, however, where the power is annexed to the *office of trustees*, and one or more of the trustees named, refuse to accept the office, the power may be exercised by those who do accept.⁵ When the power is given to a trustee, his heirs, executors, or administrators, it will not be well executed by a devisee,⁶ or an assignee of the trustee;⁷ but it has been held that a power for a *survi-*

¹ As to strictness of the rule, see *Barber v. Cary*, 1 Kern., (11 N. Y.,) R., 397; see also *Soheir v. Williams*, 1 Curtis, 479; see also *Cole v. Wade*, 16 Ves., Jr., 27; *McKim v. Handy*, 4 Md. Ch., 230.

² Co. Litt., 113; 1 Sugd. on Pow., 141, 6th ed.

³ 1 Sugd. on Pow., 144; *Gartland v. Mayott*, 2 Vern., 105; *Byam v. Byam*, 24 L. J. Ch., 209; 19 Jur., 79, and 19 Beav., 58.

⁴ 1 Sugd. on Pow., 244, 6th ed.

⁵ *Clark v. Parker*, 19 Ves., 19; *Worthington v. Evans*, 1 S. & St., 165; *Hawkins v. Kemp*, 3 East, 410; *Flanders v. Clark*, 1 Ves., 9; *Davoue v. Fanning*, 2 Johns. Ch., 252; *Matter of Stevenson*, 3 Paige, 420; *King v. Donnelly*, 5 Paige, 46; *Niles v. Stevens*, 4 Denio, 399.

⁶ *Cole v. Wade*, 16 Ves., Jr., 27; *Ockleston v. Heap*, 1 DeGex. & Sim., 640.

⁷ *Bradford v. Belfield*, 2 Sim., 264; see *Earl Granville v. McNeile*, 7 Hare, 156.

ving trustee to appoint will be well executed by a *continuing* or *sole acting* trustee.¹

Where the will contains a direction which amounts to a direct gift in the first instance, but *subsequently* gives to the trustees a *discretionary* power, authorizing them to annul the gift, the donee will be entitled unless and until the trustees defeat the bequest by the exercise of their power. Thus, a testator directed his executors to appoint his grandson John, a partner, and gave him a legacy of £4,000, when he should become a partner. By a subsequent codicil he declared that it should be entirely to his executors' discretion to appoint John a partner, notwithstanding the former direction; and if they should not think proper to appoint him, the legacy of £4,000 was to be void.

One of the executors, John's father, wished to make John a partner, the other two were against it. But the Lord Chancellor said, if the executors had united in declaring that John was *unfit* to be admitted, and without collusion or fraud, they had a right to exclude him; and he must have lost the £4000. But as the circumstances were, and as they had made no such declaration, John was entitled to be admitted a partner, and also to his legacy.² So also when a testator, after giving a legacy of £2,000 to his natural son, added a discretionary power for his executors to pay him the interest on the principal. The executors renounced probate and the

¹ Sharpe v. Sharpe, 2 B. & A., 405; Eaton v. Smith, 2 Beav., 236.

² Wainwright v. Waterman, 1 Ves., Jr., 311.

legatee became insolvent. Sir William Grant, M. R., held, that as the bequest was in the first instance *absolute*, and the executors had not exercised their power, and having renounced could no longer exercise it, the legatee continued absolutely entitled.¹

These discretionary powers are usually in the nature of a trust, and are designed for the benefit of the declared objects, whether as a class or as individuals, and for that reason courts will endeavor to adopt a construction by which the object of the testator's bounty will take a vested interest in the gift. Thus, where there was a bequest of an annuity, to be applied for the maintenance and benefit of the legatee, "*in such manner*" as the trustees in their absolute and uncontrolled discretion shall think fit, it was held by Sir K. Bruce, V. C., that the direction to apply the annuity for the legatee's benefit, being absolute, the *whole* was to be applied for that purpose; "that the trustees' discretion was as to the *manner* of the application, not whether there should or should not be any application at all."²

When the class of discretionary powers pertain to the management of the trust estate, such as powers of leasing, selling, appointing new trustees, felling timber, etc., the court is more ready to control the trustees in the exercise of their discretionary powers, than in matters of private opinion and judgment; because on these matters of fact the

¹ Keates v. Burton, 14 Ves., 434; French v. Davidson, 3 Mad., 396.

² Stephens v. Lawry, 2 N. C. C., 87; Cowles v. Brown, 4 Coll., 77.

court is as competent as the trustees themselves to determine what is for the benefit of the estate; and hence, in these matters the court will readily enter into the consideration of the motives of a trustee in exercising or refusing to exercise such a power, and will not suffer him to exercise his discretion in an arbitrary and capricious manner.¹ But in these, as in all other instances, it is the manifest intention of the donor, as gathered from the instrument creating the power, that is to determine the limits of the discretion delegated; therefore, if that instrument expressly declare that the discretion of the trustee in these matters is to be absolute and uncontrolled, without responsibility to any, the jurisdiction of the court must be excluded.²

Where the discretionary power to be exercised, depends upon a matter of pure personal judgment, the trustees will be deemed to be the only persons competent to exercise the power, for they may have private and peculiar grounds for their opinions, into which the court may not inquire.³

Upon principles of public policy, conditions annexed to legacies, devises, or contracts, operating unduly in restraint of marriage, as well as contracts entered into for the purposes of promoting

¹ *Mortimer v. Watts*, 14 Beav., 616; *Lord Milsington v. Earl Mulgrave*, 3 Mad., 491; *Hill on Trustees*, 494; *Webb v. Earl of Shaftsbury*, 7 Ves., 480, 487.

² *Cochran v. Paris*, 11 Gratt., 356; *Leavitt v. Beirne*, 21 Conn., 2; *Mel-sington v. Mulgrave*, 3 Mad., 493.

³ *Clark v. Parker*, 19 Ves., 11; see *Mesgrett v. Mesgrett*, 2 Vern., 580; *Daley v. Desbouverie*, 2 Atk., 261; *Cole v. Wade*, 16 Ves., 27; *Brereton v. Brereton*, 2 Ves., 87, cited.

marriage for a reward, or in fraud of one of the parties to the marriage, or their friends, are utterly null and void. Thus, all conditions annexed to gifts, generally prohibiting marriage, are "contrary to the common weal and good order of society."¹ Where a personal legacy is bequeathed to a person, upon marriage under twenty-one, or other reasonable period, *with the consent* of a person designated by the testator, such legacy will not vest unless the proper consent be obtained; because it is a precedent condition, and imposes no other restraint upon the liberty of marriage than was before imposed, or allowed by law.²

In the case of *Stackpole v. Beaumont*,² the testator devised his real estate in remainder to the use of L. W. or such person, if any, with whom she should first intermarry, "if before twenty-one, then with the consent of his trustees or the survivor of them," for their joint lives and the life of the survivor, &c. Near the end of his will he gave to L. W. £10,000, "payable and to be paid to her as follows:—£5,000 upon her marriage with such consent as aforesaid, and £5,000 within two years next afterwards." L. W., while an infant and a ward of court, eloped, and was married in Scotland with-

¹ *Rishton v. Cobb*, 9 Sim., 615, 619; *Morley v. Rennoldson*, 2 Hare, 570; *Connelly v. Connelly*, 7 Moore P. C., 438: or where it leads to a probable prohibition of marriage, *Keily v. Monck*, 3 Ridg. P. C., 205; *Long v. Dennis*, 4 Burr., 255; *Waters v. Tazwell*, 9 Md., 291; *Maddox v. Maddox*, 11 Gratt., 804; *Scott v. Tyler*, 2 Bro. C. C., 431, and 2 Lead. Ca. Eq., 106, 183.

² *Hemmings v. Munkley*, 1 Bro. C. C., 304, and 1 Cox, 38; *Stackpole v. Beaumont*, 3 Ves., 89; *Scott v. Tyler*, 2 Bro. C. C., 431; see also *Clifford v. Beaumont*, 4 Russ., 325; *Knight v. Cameron*, 14 Ves., 389.

out the consent of the trustees. It was held that she was not entitled to the legacy. Lord Rosslyn said: "Confined to cases where the restraint operates only up to the age till which, by the law and policy of the country, consent is necessary, I have no difficulty to say there is no authority to lead the court to pronounce a proposition so repugnant to that law, as that such a condition is invalid. The question is not whether any forfeiture has been incurred, but whether the parties to whom the legacy is given, have put themselves in a situation to answer the description of the person to take. There is no gift here but in the direction to pay, for I cannot stop in the middle of the sentence. He gives her £10,000; that is, in effect, two sums of £5,000, one payable upon her marriage with consent. She has not married with consent; she has married without it, etc.

But where the condition in restraint of marriage is *general*, and subsequent, the condition is altogether void, and the party retains the interest given to him, discharged of the condition.¹ But where the property is limited to a person until marriage, and upon marriage, then over, the limitation is good.²

Where an interest in a legacy is vested in a party, and there is a subsequent provision for divesting that interest in case the legatee marries without the required consent, and there is no gift

¹ *Morley v. Rennoldson*, 2 Hare, 579; *Lloyd v. Branton*, 3 Mer., 117.

² *Scott v. Tyler*, 2 Bro. C. C., 431; *Jordan v. Holkham*, Ambler, 209; *Barton v. Barton*, 2 Vern., 308.

over to take effect on the marriage without such consent, the condition will be treated as one in *terrorem*, and will not be enforced.¹ But if the legacy be given over on the failure of the donee to comply with the condition, the court will recognise the interest of the party who is entitled under the limitation over, and the forfeiture will be enforced in his favor, if the donee marry without the required sanction.² In the case of *Dashwood v. Lord Bulkeley*,² the testatrix by her will gave and bequeathed £12,000 to trustees, in trust to apply out of the interest unto her granddaughter, Elizabeth Callander, the sum of £250 a year for her maintenance and education, until she should attain the age of twenty-one years; the residue of the dividends to accumulate for her benefit: and when she should have attained the age of twenty-one or be married, in trust to apply the dividends of the funds in which the said sum of £12,000 and the savings should be invested for the benefit of the said Elizabeth Callander during the residue of her life, for her sole and separate use, exclusive of her husband, &c., and after her death with limitation over to any children of hers living at the time of her death, &c.

¹ Hill on Trustees, 496, citing *Semphill v. Hayley*, Prec. Ch., 562; *Garrett v. Pretty*, 2 Vern., 293; S. C., 3 Mer., 120; *Wheeler v. Bingham*, 3 Atk., 364; *Lloyd v. Branton*, 3 Mer., 117. But this doctrine only applies to pecuniary legacies, and not to a charge on real estate, see *Harvey v. Ashton*, 1 Atk., 379; *Reynel v. Martin*, 3 Atk., 333; *Berkley v. Rider*, 2 Ves., 535; *Stackpole v. Beaumont*, 3 Ves., 89.

² *Dashwood v. Lord Bulkeley*, 10 Ves., 230; *Scott v. Tyler*, 2 Bro. C. C., 431, and 2 Lead. Ca. Eq., 106, 183; *Daley v. Desbouverie*, 2 Atk., 261.

The testatrix also gave to the trustees a further sum upon further trusts, &c., for the said Elizabeth; and it was provided and declared that if the said Elizabeth Callander should at any time marry, either during her minority or after she should attain her age of twenty-one years, without the consent in the writing of the testatrix, said executors, in such case, instead of being permitted to receive the whole dividend or annual produce of the bequests therein before given to or in trust for her as aforesaid, the testatrix thereby directed that the sum of £400 only should from thenceforth be paid to her thereout, during the residue of her life, for her separate use; and that, in such case, the residue of the dividends or annual produce of all such bequests so given for her benefit, as aforesaid, should, after marriage, without such consent, accumulate for the benefit of her children or other persons, who, under the will, should become entitled to the capital upon the death of Elizabeth Callander, &c. The testatrix made similar dispositions in favor of others, with similar limitations over in the event of death without children, etc.; and, finally, in such event of failure, &c., she disposed of the said £12,000 upon other trusts. She appointed four trustees—Lord Bulkeley, Sir Mathew White Ridley, George Bogg and Mr. Keate, and by a codicil, taking notice that she had the greatest opinion of the integrity of her executors, and not the least doubt of their care and attention, yet for reasons assigned,¹ she thought it more safe to have the

¹ 10 Ves., 232.

direction of the Court of Chancery, and, therefore, directed a bill to be filed. The testatrix died in 1789, and in 1793 George Dashwood paid his addresses to Miss Callander, who had not yet attained twenty-one years of age; and his solicitor, by his direction, sent a letter to Bogg, one of the trustees, dated 16th November, 1793, declaring his purpose to settle £6,000 on his intended marriage with Miss Callander, &c. Bogg communicated this to the three other trustees. They all approved the proposal, and two of them, Lord Bulkeley and Sir Mathew White Ridley, wrote to him their approval.

The proposal of George Dashwood being wholly approved, a settlement according to its terms was drafted and sent to Sir John Dashwood and his son; but Sir John being suddenly taken ill, and dying soon afterwards, the settlement was not executed. After his father's death, Mr. Dashwood refused to execute any settlement. After several attempts to have the settlement executed, and Dashwood persistently refusing to execute, the trustees notified him of the withdrawal of their consent. Miss Callander attained the age of twenty-one, and was married the day after to Mr. Dashwood without any settlement. But shortly after, by indentures, he settled £60 per annum Long Annuities, £1,865, 1s. 3d. three per cent., Consolidated Bank Annuities, according to his proposal.

Under these circumstances the bill was filed by Mr. and Mrs. Dashwood, insisting that the consent of the executors was not necessary; that if it was

the marriage was with their consent; and that having once given their consent, they could not withdraw it, offering to complete the settlement by settling £3,000 more, and therefore praying that the plaintiffs may be declared entitled under the bequest of the sum of £12,000, &c.; or, if the court should be of opinion that the marriage was without consent, claiming the £400 a year. The trustees, by their answer and depositions, being examined by the plaintiffs, admitted the letters stated in the bill, and their approbation of the intended marriage, and consent thereto, upon the terms of Mr. Dashwood's proposal.

By a decree, pronounced by Lord Rosslyn, on the 25th April, 1796, it was declared that the plaintiff, Elizabeth Dashwood, was only entitled to the £400 a year under the will. After the death of Mr. Dashwood his widow presented a petition for a rehearing—insisting that, under the circumstances, by her said marriage she did not forfeit any of the bequests under the will.

Lord Eldon, after hearing the arguments of Mr. Romilly and Mr. Martin, in support of the petition of rehearing, remarked, "If there ever was a case in which it was reasonable that the trustees should not consent, this is the case. The husband having obtained their consent by proposing a settlement, and immediately before the marriage refusing to make any settlement, they were justified in saying they would not consent, unless he would make a previous settlement; which is the expression both of the letters and depositions. There are many

cases in which the trustees might, notwithstanding he was bound to make a settlement, refuse to consent without a previous settlement. It is impossible not to have a wish to relieve this lady, but I do not see my way to it. I will read the cases, and then say whether it is necessary to hear the defendants." But after reading the cases and hearing the defendants, Lord Eldon could find no ground for reversing or changing the former decree of Lord Rosslyn. His Lordship held, that it would be very dangerous as a general principle, to hold, that, if at a particular time a person in *loco parentis*, as guardian, upon a conscientious sense of duty, thinks himself required to give consent, and previously to the marriage is duly informed of circumstances that ought to have operated at first to make him withhold his consent, if he has once given it, he shall not afterwards alter his mind. The cases have gone *this* length; that if consent is once given, it shall not be withdrawn by adding terms, that do not go to the *propriety of giving the consent*." He thought the case of Lord Strange *v. Smith*,¹ a very different one. There the mother of the lady seemed to be of a very perverse disposition, and the moment the propositions were acceded to she said her daughter should never marry into that family. "Under these circumstances the Lord Chancellor was of opinion, and rightly, that a consent having been

¹ Ambl., 263; Mesgrett *v. Mesgrett*, 2 Vern. 580; Campbell *v. Lord Netterville*, cited 2 Ves., 534; Dashwood *v. Lord Bulkeley*, 10 Ves., 243; see also Knight *v. Cameron*, 14 Ves., 389; Holmes *v. Lysight*, 2 Bro. P. C., 261; Gillett *v. Wray*, 1 P. Wms., 284.

given without conditions, everything reasonable agreed to, no fair objection, either of a moral or pecuniary nature, it was a fraud upon the affections of the daughter to retract the consent merely from caprice and perverseness."¹

Where the testator, by his will, requires that his daughter, who is single at the date of his will, shall obtain the consent of his executors or trustees to her marriage; but the daughter afterwards marries in the lifetime of the testator and with his approbation, the condition in the will is dispensed with.²

Where the condition of obtaining the consent has become impossible by the death of the person whose consent before marriage was necessary, such impossibility will become a sufficient excuse and the marriage may take place without a forfeiture.³ So, also, where a legacy was bequeathed to a lady upon condition of her marrying with the consent of two persons, who were also executors; on the death of one of them, the condition having become impossible, it was held that she might marry without the consent of the survivor.⁴ Where the consent of an executor to the marriage was made necessary, but the executor renounced, and administration was granted to an administrator *cum testamento annexo*,

¹ See preceding note.

² *Crommelin v. Crommelin*, 3 Ves., 227; *Wheeler v. Warner*, 1 S. & St., 304; *Smith v. Cawdrey*, 2 S. & St., 358; *Clark v. Berkley*, 2 Vern., 720; *Hill on Trustees*, 497.

³ Per Lord Hardwick in *Graydon v. Hicks*, 2 Atk., 16; and see *Aislabie v. Rice*, 3 Mad., 256.

⁴ *Peyton v. Bury*, 2 P. Wms., 626; but see *Jones v. Earl of Suffolk*, 1 Bro. C. C., 529.

and a marriage took place without any consent, Lord Hardwick was of the opinion that the legacy was forfeited; that the word "executor" was a description of every person who should be administrator; and that it was a power not annexed to the office of executor, but independent from the rest of his duties as executor.¹

But where consent is necessary to a marriage, as a condition precedent, a *subsequent* approbation by such persons will be immaterial, because it cannot amount to a performance of the condition, or dispense with the breach of it. Lord Hardwick, in a case where the marriage was to take place with the *consent* or *approbation* of the trustee, who did not give his approbation until a month after the marriage, struggled hard to distinguish between *consent* and *approbation*; but Lord Thurlow denied the doctrine. He could not see why a *subsequent* approbation, if sufficient eleven months after, would not do at any time during the whole life of the trustee, during which time it must be quite uncertain whether the marriage was had in conformity with the condition or not.²

Where a long time has been permitted to elapse after a forfeiture is said to have been incurred by marrying without consent, before any claim has been insisted on, the *onus probandi* will be upon the

¹ Graydon v. Hicks, 2 Atk., 16.

² Reynish v. Martin, 3 Atk., 330; Fry v. Porter, 1 Ch. Ca., 138, and 1 Mod., 300; Lord Hardwick's opinion in Burletan v. Humphrey, Amb., 256; Lord Thurlow, as reported by Lord Eldon, in Clark v. Parker, 19 Ves., 21; but see Berkley v. Ryder, 2 Ves., 233.

one asserting the forfeiture. Thus, where a legacy was given, conditional on the consent and approbation of the trustees, and the party entitled in default of consent, made no claim until twenty-eight years had elapsed after the marriage, and the trustees and the legatee were all dead, it was held by Sir J. Romilly, M. R., although there was no distinct proof of consent, yet it was to be presumed under the circumstances of the case; and his honor further remarked, "the ground I proceed upon is, that after the lapse of twenty-eight years from the marriage, and after the death of the trustees, everything is to be presumed in favor of the legatee. If this contest had taken place immediately after the marriage had occurred, and the fact before me had been that the trustees knew nothing about it, and gave their approbation subsequently, I should be of the opinion that the legacy was forfeited."¹

If the consent of the trustee be not required to be in *writing*, it may be an *implied* or *tacit* consent, which may be inferred from the conduct of the trustees, as where they have been privy to and have encouraged, or, at any rate, have not discouraged the courtship,² or it may be a *general* license, giving the party "free leave and consent to marry whomsoever she choosed";³ and where the consent is required to be given in *writing*, unless the *particular*

¹ *Re Birch*, 17 Beav., 358.

² *Lord Strange v. Smith*, Amb., 263; *Mesgrett v. Mesgrett*, 2 Vern., 580; *D'Aguila v. Drinkwater*, 2 V. & B., 225; see also *Clark v. Parker*, 19 Ves., 12, 18, 19; *Dashwood v. Lord Bulkeley*, 10 Ves., 243.

³ *Mercer v. Hall*, 4 Bro. C. C., 328; *Pollock v. Croft*, 1 Mer., 181.

manner be specified in the trust instrument, any informal or incomplete writing, signed by the proper party, in which the consent is sufficiently expressed, will be sufficient.¹

SECTION II. POWERS OF SALE.

A power of sale may be given, either as appendant to the legal estate, and to take effect out of it; or it may exist as a mere collateral authority, unaccompanied by any legal interest in the property to be sold. In the latter case, if the trust be created by will, the legal estate will descend to and remain vested in the heirs of the testator until divested by the execution of the power, whereupon it will pass to the vendee.²

The general rule is, where lands are *devised to executors to sell*, the freehold passes to them by the devise, coupled with the power;³ but when there

¹ *Clark v. Parker*, 19 Ves., 18, 19; *Dashwood v. Lord Bulkeley*, 10 Ves., 243; *Lord Strange v. Smith*, Amb., 263; *Worthington v. Evans*, 2 S. & St., 165; see also *Daley v. Desbouverie*, 2 Atk., 261; *D'Aguilar v. Drinkwater*, 2 V. & B., 225; *Merry v. Ryves*, 1 Eden, 1; *Le Jeune v. Budd*, 6 Sim., 441.

² *Hill on Trustees*, 471; *Earl of Stafford v. Buckley*, 2 Ves., 179; *Warneford v. Thompson*, 3 Ves., Jr., 513; 1 Sugd. on Pow., 115, (6th ed.); see *Forbes v. Peacock*, 11 Sim., 152; 3 N. Y. Rev. Stat., 20, sec. 75, (5th ed.); *Vail v. Vail*, 4 Paige, 317; *Allen v. DeWitt*, 2 Coms., 276; *Farmers' Loan and Trust Co. v. Carroll*, 5 Barb., 613; *Lang v. Ropke*, 5 Sand., 363; *Germond v. Jones*, 2 Hill, 569.

³ 4 Kent's Com., 320; *Howell v. Barnes*, Cro. Com., 382; *Yates v. Compton*, 2 P. Wms., 308; *Bergen v. Bennett*, 1 Cai. Ca. Er., 16; *Jackson v. Schaubert*, 7 Cow. Rep., 187; *Peck v. Henderson*, 7 Yerg., 18; *Peter v. Beverly*, 10 Pet., 532; *Tainter v. Clark*, 13 Metc., 220; *Jackson v. Burr*, 9 Johns. R., 104; *Zebach v. Smith*, 3 Binn., 69; *Richardson v. Woodbury*, 43 Maine, 206; see also *Shippen's Heirs v. Clapp*, 29 Penn. St. Rep., 265; *Wilburn v. Spofford*, 4 Sneed, 698.

is a devise of lands to be sold by the executors, without any words of direct gift, or when the devise is, "*that they shall sell*," they will be invested with a *mere power*, unaccompanied with the legal estate.¹

In New York, says Chancellor Kent, "the Revised Statutes have interfered with these distinctions, though they seem not to have settled them in the clearest manner. They declare² that a devise of lands to executors, or other trustees, to be sold or mortgaged, when the trustees are not empowered to receive the rents and profits, shall vest no estate in the trustees; but the trust shall be valid as a power, and the land shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power. If the construction of this section be, that a devise of the lands to executors to be sold, does not pass an interest without a special authority to receive the rents, then the estate does not, in any of the cases already mentioned, pass to the executors, and the devise is only a power simply collateral. The English rule is, that an estate may be conveyed to trustees to sell, with a provision that the rents and profits be in the meantime received by the party who would have been entitled if the deed had not been made, and yet the

¹ 4 Kent's Com., 320; *Ferebec v. Prockter*, 2 Dev. & Batt., 439; S. C., 3 Dev. & Batt., 496, and 1 Ired. Eq., 123; *Patton v. Crow*, 26 Alab., 426; *Haskell v. House*, 3 Brev., 242; *Thompson v. Gaillard*, 3 Rich Eq., 418; *Marsh v. Wheeler*, 2 Edw. Ch., 156; *Taylor v. Benham*, 5 How., 269; *Allen v. DeWitt*, 3 Coms., 276; *Schwartz's Estate*, 14 Penn. St. Rep., 47; *Guyer v. Maynard*, 6 Gill. & John., 420.

² 1 Rev. S., 729, sec. 56; 4 Kent's Com., 321.

trustees will take a fee.”¹ “If the trust be valid as a power then, in every such case² the lands to which the trust relates, remain in or descend to, the persons entitled, subject to the trust as a power. The statute authorizes express trusts to be created to sell lands for the benefit of creditors, or for the benefit of legatees, or for the purpose of satisfying charges.³ These are the very trusts or powers relative to executors which we are considering; and by the same statute⁴ every express trust valid as such in its creation, *except as therein otherwise provided*, vests the whole estate in the trustees, subject to the execution of the trust. The conclusion would seem to be, that, as a general rule, every express trust created by will to sell lands, carries the fee with it; but if the executors be not also empowered to receive the rents and profits, they take no estate, and the trust becomes a power without interest.⁵ This restriction of the general rule applies to the case of a devise of lands to executors, to be sold or mortgaged; and the usual case of a direction in the will to the executors to sell lands to pay debts, or legacies, is not within the liberal terms of the restriction; and it may be a question whether it be one of the cases in which, according to the 60th section above mentioned, ‘the whole estate is in the trustee.’”

¹ Keene v. Deardon, 8 East Rep., 248. But the law in Ohio differs, see Dabney v. Manning, 3 Ohio Rep., 321.

² 1 R. S., N. Y., 729, sec. 59.

³ 1 R. S., N. Y., 729, sec. 55; also Gree v. Dikeman, 18 Barb., 535.

⁴ 1 R. S., N. Y., 729, sec. 60.

⁵ Dominick v. Michael, 4 Sandf. Ch. Rep., 374.

In Pennsylvania,¹ executors with a naked power of sale over real estate, take and hold the same interest therein, and have the same powers and authorities for all purposes of sale and conveyance, and also of remedy by action or otherwise, as if the same had been devised to them to be sold. The executors take the legal estate, and they may bring actions for rent falling due, or for injuries to real estate done after the death of the testator, without reference to any immediate or intended exercise of their power.¹

No precise form of words is necessary or requisite for creating a power of sale; being a mere declaration of trust, any words or expressions which show an intention to create such a power will be sufficient.² So if a sale is necessary to the due execution of the trust, it will be inferred that the testator intended to give to the person empowered every authority necessary for his declared purpose.³ Thus, trustees will take a power of sale by implication, under a trust for the payment of debts; because such a power is necessary to the due execu-

¹ Act of 1834, sec. 13, Dunlop Dig., 511; *Carpenter v. Cameron*, 7 Watts, 51; *Cobb v. Biddle*, 14 Penn. St. Rep., 444; *Blight's Ex'ors v. Ewing*, 26 Penn. St. Rep., 135; but see *Blight v. Wright*, Philad. Rep., 549, Dist. Ct. Philad. For law in Virginia, see R. S., 1849, tit. 33, ch. 116, sec. 1, and also *Mosby v. Mosby*, 9 Gratt., 584. In New Jersey, see *Snowhill v. Snowhill*, 3 Zab., 447.

² Sugd. on Pow., 116.

³ 2 Spence Eq. Jur., 366; *Going v. Emery*, 16 Pick., 111; *Winston v. Jones*, 6 Alab., 550. But a mere direction to divide is not sufficient: *Craig v. Craig*, 3 Barb. Ch., 76; see also *Moore v. Lockett*, 2 Bibb., 69, and *Clark v. Riddle*, 11 S. & R., 311; *Morton v. Morton*, 8 Barb., 18.

tion of the trust.¹ So, also, where there is a direction to *divide* and *pay over* the shares of the legatees, where a literal division is impracticable, a power of sale will be implied for such purpose.²

This power of sale, as a general rule, can be exercised only by those to whom it is expressly given; at least such is the common law doctrine, as well as that taking effect under the statute of uses.³ But it sometimes happens that a testator directs his estates to be sold for certain purposes, without declaring by whom the sale shall be made. In the absence of such a declaration, if the fund be distributable by the executor, he will have the power of sale by implication.⁴ But where a testator bequeathed an estate to his wife for life, and directed that after her decease, the estate should be sold to the highest bidder, by public auction, and the money arising from such sale be disposed of amongst certain persons named in his will, and he appointed his wife and another person his executors, it was held that the power was not given by implication to the executors, because they had nothing to do

¹ Wood v. White, 4 M. & Cr., 481; Earl of Bath v. Earl of Bradford, 2 Ves., 590; Ball v. Harris, 8 Sim., 485, and 4 M. & Cr., 266; Forbes v. Peacock, 11 Sim., 152; per Nelson, C. J., Bogert v. Hertell, 4 Hill, 492, 500; Meakings v. Cromwell, 1 Seld., 136; Williams v. Otey, 8 Humph., 563; Goodrich v. Proctor, 1 Gray, 567; but see Linton v. Boley, 12 Mo., 567, as to what will not authorize a sale, and also Munday, v. Vawter, 3 Gratt., 518.

² Winston v. Jones, 6 Alab., 550.

³ Hill on Trustees, 472; Noel v. Harvey, 29 Miss., (7 Cush.,) 72.

⁴ 1 Sugd. on Pow., 134; Bogert v. Hertell, 4 Hill, 492; Dorland v. Dorland, 2 Barb., 63; Meakings v. Cromwell, 1 Seld., 136; see also Forbes v. Peacock, 11 Mees. & Wels., 630, and 12 Sim., 528; also Tylden v. Hyde, 2 Sim. & St., 238; see also Putnam Free School v. Fisher, 30 Maine, 528.

with the produce of the sale, nor any power of distribution with respect to it.¹ It was laid down in the case of *Meakins v. Cromwell*,² that where the will was silent as to the persons who should sell the land, a power was given by implication to the executors to make the sale; and that such power was well executed by a deed from one executor, the others not having qualified. The reason given for this decision is, that it belongs to the executor to pay the debts and legacies, and the testator having directed that to be done by means of a sale of lands, the executor should have the power to sell as incident to the accomplishment of the testator's main purpose. In New York, it is provided by statute that where the testator omits to designate a person to execute the power, its execution shall devolve upon the Court of Chancery;³ but it is held, also, that this provision has no application to cases where a person is *impliedly* designated.⁴ But where a testator authorized his executors to perform his desires and requests *hereinbefore* expressed, and then, by a *subsequent clause*, created a power in trust without any specification of a donee, it was held that the executors did not take by implication, but that it devolved upon the Court of Chancery.⁵

¹ *Bentham v. Wiltshire*, 4 Madd., 44; *Patton v. Randall*, 1 Jac. & Walk., 189; *Allum v. Fryer*, 3 Adol. & Ell., N. S., 442; *Drayton v. Drayton*, 2 Desaus. Ch. R., 250, (n.); *Schoolbred v. Drayton*, 2 Desaus. Ch. R., 246; but see *Davoue v. Fanning*, 2 Johns. Ch. R., 252.

² *Meakins v. Cromwell*, 1 Seld., 136; see the opinion of Ch. J. Ruggles, 140, 141.

³ 1 Rev. Stat., 734, sec. 101.

⁴ *Meakins v. Cromwell*, 2 Sand., 512, affirmed 1 Seld., 136.

⁵ *Crocheron v. Jaques*, 3 Edw., 207.

Where real estate is devised to executors to sell, &c., and a part of them only undertake the execution of the will, a sale by those who do accept and take upon them the administration and charge of the will, is as effectual as though all had joined.¹ Where the power is given to several persons by name as trustees, and the survivors or survivor of them, and the heirs of the survivor, the power is well exercised by the only acting trustee, or his heirs, in case the others renounce the trust.²

A naked power or authority, without an interest, given to several persons, does not survive; and it was a rule of common law that, if the testator, by his will, directed his executors, by *name*, to sell, and one of them died, the others could not sell, because the words of the testator could not be satisfied.³ But where the words of the testator can be satisfied, this rule will be relaxed. Thus, where three executors are appointed, and the devise is, that the estate shall be sold by the executors generally, and one of them dies, the survivors may sell, because the plural number remains.⁴

¹ Mackintosh *v.* Barber, 1 Bing., 50; Roseboom *v.* Mosher, 2 Denio, 61; 2 R. S. N. Y., 109, sec. 55; Taylor *v.* Morris, 1 Coms., 341; Wasson *v.* King, 2 Dev. Batt., 262; Geddy *v.* Butler, 3 Munf., 345; Woods *v.* Sparks, 1 Dev. & Batt., 389; Ross *v.* Clare, 3 Dana Ken. Rep., 195; 4 Kent's Com., 325; McDowell *v.* Gray, 29 Penn. St. Rep., 211.

² Hawkins *v.* Kemp, 3 East, 410; Cook *v.* Crawford, 13 Sim., 91; Conover *v.* Hoffman, 1 Bosw., (N. Y.,) 214.

³ Co. Litt., 112, 113; 4 Kent's Com., 325; Osgood *v.* Franklin, 2 Johns. Ch. Rep., 19, affirmed 14 Johns., 527; Peter *v.* Beverly, 10 Pet. U. S. Rep., 533; 1 Sugd. on Pow., 143, 144.

⁴ Sugd. on Pow., 144; Garbland *v.* Mayot, 2 Vern., 105; 1 N. Y. R. S., 735, sec. 112. Powers referred to in N. Y. R. S., Vol. I., 731 to 735, relate exclusively to lands.

It is well established, that where a power of sale is given to several executors, *virtute officii*, or is given to them by name, but is coupled with an interest or trust, the power may be exercised by the survivor.¹

In many of the States provisions are made by statute authorizing the survivors of several executors to exercise even naked powers given by will. Thus, in Pennsylvania,² in Missouri,³ Arkansas,⁴ Alabama,⁵ New Jersey,⁶ New York,⁷ Ohio,⁸ and Delaware.⁹ Mr. Sugden, in his work on Powers,¹⁰ states the principles governing in the determination of these questions, thus :

1. "Where a power is given to two or more by their proper names, who are not made executors, it will not survive without express words.

¹ 4 Kent's Com., 323; Osgood v. Franklin, 2 Johns. Ch., 19; Niles v. Stevens, 4 Denio, 399; Jackson v. Burtis, 14 Johns., 391; Sharp v. Pratt, 15 Wend., 610; Zebach v. Smith, 3 Binn., 69; Wood v. Sparks, 1 Dev. & Batt., 389; Peter v. Beverly, 10 Pet., 532; 1 How. U. S., 134; Putnam Free School v. Fisher, 30 Maine, 526; Miller v. Meetch, 8 Barr, 417; Coykendall v. Rutherford, 1 Green Ch., 360; Robertson v. Gaines, 2 Humph., 367. As to what interest is requisite to enable a surviving trustee, executor, etc., to exercise the power of sale, see Watson v. Pearson, 2 Exch., 580, and American note; Gray v. Lynch, 8 Gill., 403.

² Dunlop P. Dig., 519, act 1834, sec. 13; act March 12, 1800, declared to be in force by act of 19 April, 1856, Bright. Supp., 1170; act of 3 May, 1855, sec. 2, Bright. Supp., 1156.

³ Mo. R. S., chap. 3, art. 3, sec. 1.

⁴ Rev. St. Ark., chap. 4, sec. 144.

⁵ Aik. Dig., 450; Lucas v. Price, 4 Alab., 683.

⁶ N. J. Rev. Code, tit. 10, chap. 7, sec. 19.

⁷ 1 R. S., 735, sec. 112; Osgood v. Franklin, 2 Johns. Ch., 1, and 14 Johns., 527.

⁸ Ohio R. S., chap. 129, sec. 59, 60.

⁹ Del. Rev. Code, chap. 90, sec. 17.

¹⁰ 1 Sugd. on Pow., 146.

2. "Where the power is given to three or more generally, as to 'my trustees,' 'my sons,' &c., and not by their proper names, the authority will survive while the plural number remains.

3. "Where the authority is given to 'executors,' and the will does not expressly point to a joint exercise of it, even a single surviving executor may execute it; but,

4. "Where the authority is given to them *nominatim*, although in the character of executors, yet it is at least doubtful whether it will survive.

5. "But where the power to executors to sell arises by implication, the power will equally arise to the survivor." And he further adds: "I shall close this subject with Sir Edward Coke's advice, to give the authority to the executors or the survivors, or survivor of them, or to such or so many of them as take upon them the probate of the will, etc."

Thus, under the fourth rule stated as doubtful by Mr. Sugden, a power of sale was reserved in a settlement to three trustees by name and their heirs, the Court of Kings Bench held that two surviving trustees could not execute the power.¹ But in a recent case where a testator devised all his residuary estate to three persons by name, and to their respective heirs and assigns, in trust, that they, the "*above named*" devisees "and their respective heirs and assigns" should sell, it was held by the

¹ *Townsend v. Wilson*, 1 B. & Ald., 608, and S. C., 3 Madd., 261; see also *Hall v. Dewes*, Jac., 189.

Vice Chancellor that, on construction of the will, the two survivors of the three devisees had power to sell, and he rejected the word "respective" as inconsistent with the *general* intention.¹

In respect to the first rule above stated, it has been held that it does not apply to business of a *public* or *judicial* nature; that, in such cases, a power entrusted to several may be executed by a majority.²

It has been laid down that, where the will gives no *positive direction* to sell, but refers the power to sell to the *judgment and discretion* of the executors, all must join in the sale.³ But, in New York it does not seem to be necessary that all should qualify or act, though the powers of the executors are *discretionary*.⁴

As a general rule, administrators, *cum testamento annexo*, succeed only to the ordinary administration duties and authorities, and consequently cannot exercise any trust or power given by will with reference to real estate.⁵ But this rule, as to the

¹ Jones v. Price, 11 Sim., 557.

² Chambers v. Perry, 17 Alab., 726.

³ Moore, 61, pl. 172; Sir William Grant, in Cole v. Wade, 16 Ves., 27, 45, 46, 47; Walter v. Maunde, 19 Ves., 424; Clay v. Hart, 7 Dana Rep., 8; Wooldridge v. Watkins, 3 Bibb., 350; see also Meakings v. Cromwell, 1 Seld. R., 136; Mallet v. Smith, 6 Rich Eq., 22; Bartlett v. Sutherland, 2 Cush., 401.

⁴ Taylor v. Morris, 1 Coms., 341; see also Wood v. Sparks, 1 Dev. & Batt., 389, and Chanet v. Villeponteaux, 3 McCord, 29; but see Shelton v. Homer, 5 Mete., 462; Ross v. Barclay, 18 Penn. St. Rep., 179; see Lane v. Debenham, 17 Jur., 1005; Byam v. Byam, 24 L. J. Ch., 209, and 19 Beav., 58.

⁵ Conklin v. Egerton, 21 Wend., 430; but see S. C., 25 Wend. Rep., 224, and also Gilchrist v. Rea, 9 Paige, 72; Beekman v. Bonsor, 23 N. Y. Rep., 304; but see Dominick v. Michael, 4 Sandf. S. C. R., 374; Tainter v.

powers of sale, has been altered in many of the States by statute;¹ yet, in some of them, it is held still not to extend to powers of sale except for payment of debts, and not for the execution of trusts for collateral purposes, or for the exercise of *discretionary* powers.²

Where a testatrix had authorized and empowered her trustees to sell lands where the major part of her children should recommend and advise the same, it was held that the consent of the majority of those living at the time of sale was sufficient to satisfy the words of the will,³

Although trustees may not delegate these powers unless expressly authorized, yet it is understood they may employ a solicitor or other agent to conduct the usual details of the sale;⁴ but the agent's

Clark, 13 Metc., 220; *Armstrong v. Park*, 9 Humph., 195; *Knight v. Loomis*, 30 Maine, 208; *Ross v. Barclay*, 18 Penn. St. Rep., 179; *Lucas v. Doe*, 4 Alab., 679; *Wills v. Cowper*, 2 Ohio, 124.

¹ In North Carolina, see R. S., ch. 46, sec. 34; *Hester v. Hester*, 2 Ired. Eq., 330; *Smith v. McCrary*, 3 Ired. Eq., 204. In Pennsylvania, see *Dunlop's Dig.*, 530; act of 1834, sec. 67; acts of 1800 and 1836, *Bright. Supp.*, 1169; *Com. v. Forney*, 3 W. & S., 357; but see *Ross v. Barclay*, 18 Penn. St. Rep., 179. In Missouri, R. S., art. 3, ch. 3, sec. 1. In Mississippi, see *H. & H. Dig.*, 413. In Ohio, see R. S., ch. 129, sec. 59. In New Jersey, see R. S., tit. 10, ch. 7, sec. 19. In Arkansas, see R. S., ch. 4, sec. 144. In Vermont, see R. S., tit. 12, ch. 46, sec. 2. In Virginia, see *Rev. Code*, p. 545; *Brown v. Armistead*, 6 Rand., 594. In South Carolina, see 5 *Coop. Stat.*, 15; *Drayton v. Grimke*, 1 *Bail. Eq.*, 393.

² *Ross v. Barclay*, 18 Penn. St. Rep., 179; *Brown v. Hobson*, A. K. Marsh, 381; *Woodridge v. Watkins*, 3 Bibb., 350; *Montgomery v. Milliken*, *Smedes & Marsh Ch.*, 498, and 5 *Smedes & Marsh*, 188. But where the power of sale is imperative, and no peculiar personal confidence reposed, *Brown v. Armistead*, 6 Rand., 594; see also *Taylor v. Morris*, 1 *Coms.*, 341.

³ *Soheir v. Williams*, 1 *Curtis C. C. Rep.*, 479.

⁴ *Ex parte Belchier*, *Ambl.*, 218; *Ord v. Noel*, 5 *Madd.*, 498; *Black v. Erwin*, *Harp. L. Rep.*, 411; *Pearson v. Jamison*, *McLean*, 199; *Newton v. Bronson*, 3 *Kern.*, 587; *Berger v. Duff*, 4 *Johns. Ch. Rep.*, 368.

authority must be in writing and signed by the trustees,¹ or at least ratified by an instrument in writing.²

In *Hawley v. James*,³ the Chancellor decided that a general authority to sell and convey lands belonging to the estate, or to contract absolutely for the sale of such lands, could not be given by trustees with power of sale: but, he observed, "they may entrust an agent with an authority to make conditional sales of land lying at a distance from the place of residence of the trustees, subject to the ratification of the trustees; and they also may empower him to make and execute valid conveyances of land thus sold, upon a compliance with the terms of sale, *after* such sales have been so ratified by them. The purchaser, in such case, however, would probably be bound to show that this precedent condition had been complied with. The better course in a case of this kind, therefore, is to entrust the agent with a discretionary power to contract, subject to the ratification of the trustees, upon his report of the facts; and that they should themselves execute the conveyance, when the terms of sale have been complied with, and transmit it, properly acknowledged, to the agent to be delivered to the purchaser."

As to the *execution* of powers they are strictly construed. They are incapable of admitting any

¹ *Mortlock v. Buller*, 10 Ves., 311.

² *Newton v. Bronson*, 3 Kern., 587.

³ *Hawley v. James*, 5 Paige, 487; *Newton v. Bronson*, 3 Kern., 587; see as to acting by attorney, *Sinclair v. Jackson*, 8 Cowen, 582; *May's Heirs v. Fransee*, 4 Litt., 391; *Telford v. Barney*, 1 Iowa, 591.

equivalent or substitution; for the person who creates the power has the undoubted right to create what checks he thinks necessary to guard against a tendency to abuse,¹ hence, if a deed be expressly required, the power cannot be executed by a will; and if the power is to be executed by will, it cannot be executed by any act to take effect in the lifetime of the donee of the power.² Upon the same principle, as a general rule, a power to sell and convey does not confer a power to mortgage.³ But it is, nevertheless, held that a power for trustees to sell, will authorize a mortgage by them, which is a conditional sale, wherever the *objects* of the trust will be answered by a mortgage; as, where the trust is to pay debts or raise portions.⁴ In *Bloomer v. Waldron* this doctrine, as a general proposition, is denied. The judge remarked that "the mere raising of money for the payment of debts, portions, &c., is not enough. There must be, I apprehend, some pressing exigency apparent on the face of the will or power."⁵

But still a power will enable the donee to dispose of the fee, though it contain no words of inheritance, by means which would seem to be equivalent,

¹ 4 Kent's Com., 330.

² 4 Kent's Com., 331; *Earl of Darlington v. Pulteney*, Cowp. Rep., 260; 1 Story's Eq., 185; Lord Eldon in *Reid v. Shergold*, 10 Ves., 379.

³ Sugd. on Pow., 538, (6th Lond. ed.); *Bloomer v. Waldron*, 3 Hill's R., 366; *Albany F. Ins. Co. v. Bay*, 4 Coms., 9.

⁴ *Ball v. Harris*, 8 Sim., 485, and *Holme v. Williams*, 8 Sim., 557; 1 Sugd. on Pow., 538; *Lancaster v. Dolan*, 1 Rawle, 231; *Williams v. Woodward*, 2 Wend., 492; and see *Bootle v. Blundell*, 1 Meriv. R., 193, 232.

⁵ *Bloomer v. Waldron*, 3 Hill, 368; *Albany F. Ins. Co. v. Bay*, 4 Coms., 9; *Cumming v. Williamson*, 1 Sand. Ch., 17.

or a substitution. Thus, a power to charge an estate, with nothing to restrain the amount, will, in equity, authorize a charge to the *utmost value*; and, as equivalent to it, a disposition of the estate itself, in trust to sell and divide amongst the objects,¹ and it has been held that a power in a will to raise money out of the rents and profits of an estate, to pay debts or portions, includes in it a power to sell and mortgage, where it is necessary to raise money for the purposes of the trust, upon the principle that otherwise it might be impracticable to raise the money.²

A testator directed his executors to sell certain of his property immediately after his death, upon a credit of twelve months; the executors sold it upon a credit of six months. The court held that it was not such a departure from the terms of the power to sell, as to authorize the Chancellor to set aside the sale.³

Mr. Kent remarks,⁴ “the *intention* of the donor of the power, is the great principle that governs in the construction of powers; and in furtherance of the object in view, the courts will vary the form of executing the power, and, as the case may require, either *enlarge* a limited to a general power, or *cut down* a general power to a particular purpose.” But this still has reference to the testator’s intentions. Thus, a power to executors to sell the testator’s

¹ 4 Kent’s Com., 345; Wareham v. Brown, 2 Vern. R., 153; Long v. Long, 5 Ves., 445.

² Conkling v. Washington University, 2 Md. Ch. Decis., 497.

³ Richardson v. Hayden, 18 B. Monr., 242.

⁴ 4 Kent’s Com., 345; Sugd. on Pow., 452; Lord Hinchinbroke v. Seymour, 1 Bro. C. C., 395; Bristow v. Warde, 2 Ves., Jr., 336.

“fast” estate, does not give them any right to sell lands which he had, prior to his death, made an arrangement to convey.¹ So, also, a cemetery lot in which a former wife of the testator was buried, was held not to be embraced within a power of sale given by the testator to his executor to sell his property, describing it by general terms, for the payment of debts and legacies; such lot not being, without special directions, deemed to be regarded by the testator as property, except for a sacred purpose to which he had dedicated it.²

It is settled that a simple power of sale will not authorize a partition of the estate, although by a circuitous method it has sometimes been so used.³

Where a power of sale was given to trustees with direction to employ the purchase money generally for the benefit of the *cestui que trust* in a manner requiring time and discretion, as where the trust was to lay it out again in lands to the uses of the settlement, and till that was done, to invest in the funds, it was held that the trustee had power to give a discharge for the purchase money, as an incident to the trust, and without any express authority for that purpose; for such power of sale would otherwise be nugatory.⁴ So also when the money is to be employed for the payment of debts

¹ *Lewis v. Smith*, 5 Seld., 502.

² *Derby v. Derby*, 4 R. L., 414.

³ *McQueen v. Farquar*, 11 Ves., 467; *Brassey v. Chalmers*, 4 DeG., Mac. & G., 528, affirming 16 Beav., 223; *Bradshaw v. Fane*, 25 L. J. Ch., 413; *Ringgold v. Ringgold*, 1 H. & G., 11; *Taylor v. Galloway*, 1 Ham. O., 233.

⁴ *Doran v. Wiltshire*, 3 Swanst., 699.

generally;¹ or when the parties beneficially entitled to the purchase money, are infants or unborn;² or when the trusts are not capable of immediate satisfaction.³ In these and the like cases, the purchaser is not bound to see to the proper application of the purchase money by the trustees; and, hence, their receipt therefor will be a sufficient discharge. But when the object of application is specifically pointed out, and is immediate and certain, the purchaser under the power is bound to see to the proper application of the purchase money, unless the instrument creating the trust expressly excuses him from that responsibility, by providing that the receipt of the trustee shall be a sufficient discharge;⁴ or unless he is excused by some special provisions of statute enacted for such purposes.⁵

It follows that the trustee with power to sell and give receipts in discharge, has complete power of disposition over the trust estate, and may compel a purchaser to complete his contract independently of joining the *cestui que trust* as a party.⁶

As to the time *when* a power of sale must be executed, it will depend upon the directions contained in the instrument conferring the power; because in

¹ *Forbes v. Peacock*, 11 Sim., 152, 160, and *Jones v. Price*, 11 Sim., 557.

² *Sowarsby v. Lucy*, 4 Madd., 142; *Breedon v. Breedon*, 1 Russ. & M., 413; *Lavender v. Stanton*, 6 Madd., 46.

³ *Balfour v. Welland*, 16 Ves., 151, 153; 1 Lead. Cas. Eq., 102.

⁴ 2 Sugd. V. and P., 30, *et seq*; *Duffy v. Calvert*, 6 Gill., 457.

⁵ 7 and 8 Vict., ch. 76, sec. 10; 1 N. Y. R. S., 730, sec. 65, 66.

⁶ *Drayson v. Pocock*, 4 Sim., 233; *Binks v. Lord Rokeby*, 2 Madd., 227; *Duffy v. Calvert*, 6 Gill., 457.

this as in other respects, the conditions annexed to the exercise of the power must be complied with. If the power is to be exercised only on the happening of a certain event, the power cannot be exercised unless such an event happens. Thus, where the power of sale is to be exercised on the deficiency of another estate to answer certain charges thereon; if there be no deficiency, the power will not become operative.¹ So a power to sell if the income of real and personal estate be not sufficient to support the wife of the testator comfortably, can only be exercised in that event.² So a power to an agent to sell *after* redeeming on a sale for taxes, cannot be exercised before redemption.³ But a power of sale discretionary as to the *time and mode* of the sale in the trustee, can only be questioned for an absence of good faith.⁴

Upon the same principle, where the trust is to sell *after* the death of the tenant for life, a sale in his lifetime is bad even though made under a decree of court.⁵

It has been held, where a sale is directed to be made *within* a certain period, that a sale *before* its

¹ Culpepper v. Aston, 2 Ch. Cas., 221; Sugd. on Pow., 497; Bronson, C. J., in Roseboom v. Mosher, 2 Denio, 68; see also Graham v. Little, 5 Ired. Eq., 407; Bloodgood v. Bruen, 2 Bradf. Surr. Rep., 8; Minot v. Prescott, 14 Mass., 495.

² Minot v. Prescott, 14 Mass., 495.

³ Dwinney v. Reynolds, 1 W. & S., 332.

⁴ Bunner v. Storm, 1 Sand. Ch., 357; Champlin v. Champlin, 3 Edw. Ch., 571, and 7 Hill, 245.

⁵ Rodman v. Monson, 13 Barb., 63; Blacklow v. Laws, 2 Hare, 40; Ervin's Appeal, 16 Penn. St. Rep., 266; Styer v. Freas, 15 Penn. St. Rep., 339; Sweigart v. Berk. 8 S. & R., 304; Jackson v. Ligon, 3 Leigh, 161.

expiration is valid, though the conveyance be not made until afterwards,¹ and if the power of sale be coupled with a trust, a sale *after* the period fixed will be good.²

In respect to purchasers from trustees under powers of this description, Mr. Hill, in his work on trustees, remarks, "there is a material difference, whether the condition annexed to the exercise of the power, is *precedent* or *subsequent*. If it is *precedent*, its performance is essential for giving existence to the power of sale, and no sale under the power can by possibility be sustained, unless the condition be performed.³ But where the condition is subsequent, the power of sale will attach independently of the performance of the condition, and if the purchaser be expressly or constructively exonerated from seeing to the performance of the trusts, his title would not be affected by the fact that the condition had not been performed. For instance, to select the two conditions just referred to, *where the deficiency of the personal estate*, or any other property, is the condition on which the power is to be exercised, *that* is a precedent condition which must be satisfied before the power can arise; consequently it will be incumbent upon a purchaser from the trustee in any case to ascertain that the required deficiency had arisen previously to the sale. But when the reinvestment of the purchase money is required, that is a *subsequent* condition, and

¹ Harlan v. Brown, 2 Gill., 475.

² Miller v. Meetch, 8 Barr, 417; Cuff v. Hall, 19 Jur., 973.

³ Mason v. Martin, 4 Md., 125; Gibson v. Jones, 5 Leigh, 370.

a *bona fide* purchaser from the trustees will not be affected by its non-performance, if they have a power to give discharges for the purchase money.¹

It has already been remarked that a power of sale may be given as appendant to the legal estate, and to take effect out of it, or it may exist as mere collateral authority, unaccompanied with any legal interest in the property to be sold. Where the trustees take the legal estate in the property coupled with the power of sale, they are fully competent to contract and make good conveyances of the legal and equitable estates to the purchaser.² As a mere collateral authority he also may have a similar power. Thus, where a testator had directed, in his will, that his wife should retain possession of his farm for five years after his death, the family to be kept together, and the plantation to be managed by her, and certain kindred supported by her, and he provided means to enable her to conduct the farm. By a subsequent clause he authorized his executor, "at a proper time, say at the expiration of five years from the time of my decease," but expressing a desire that his wife retain possession longer if for the interest of the family, to dispose of all his estate in fee simple, and as each child comes of age to pay him or her a distributive share. The widow lived on the farm till the expiration of five years, when

¹ Hill on Trustees, 478; *Cleveland v. Boerum*, 27 Barb., 252.

² *Sowarsby v. Lacy*, 4 Madd., 142; *Keon v. Magawly*, 1 Dr. & W., 401. The same as to power of sale to executors by implication, from having the distribution of the purchase money. *Tylden v. Hyde*, 2 S. & St., 238; *Forbes v. Peacock*, 11 Sim., 152.

the oldest child being within a few months of twenty-one years of age, the executor offered the farm for sale. It was held by the court, that the executor acting in good faith, and being of opinion that the interests of the family required a sale, it would be an improper exercise of authority in a Chancellor, to interfere and substitute his own discretion for the discretion of the executor.¹

A trustee is bound to regard the interests of the *cestuis que trust* in the management of the affairs of his office; and as to the manner in which he should proceed to sell the estate in case of a trust for sale, Lord Eldon laid down the rule "that he should bring the estate to the hammer under every possible advantage to his *cestuis que trust*."² He may affix reasonable and necessary conditions where the state of the title requires it;³ but he must not impose such as are unnecessary and tend to injure the sale.⁴

Executors having a general power of sale are not restricted to any particular mode of selling, but they may sell at either public or private sale, and without advertising.⁵ But they must act in good faith, and not sell at improper times.⁶ If they are

¹ *Dixon v. McCue*, 14 Gratt., 540; *Mortlock v. Buller*, 10 Ves., 309; *Conolly v. Parsons*, 3 Ves., 628, n.; see also *Campbell v. Walker*, 5 Ves., 680.

² *Downes v. Grazebrook*, 3 Mer., 208; *Hart v. Ten Eyek*, 2 Johns. Ch., 62, 110; see also *Franklin v. Osgood*, 14 Johns., 527.

³ *Hobson v. Bell*, 2 Beav., 17.

⁴ *Welkins v. Fry*, 1 Mer., 268; 2 Rose, 375.

⁵ *Huger v. Huger*, 9 Rich Eq., 217; *McDermot v. Lorillard*, 1 Edw. Ch., 273; *Hill on Trustees*, 480.

⁶ *Quakenbush v. Leonard*, 9 Paige, 347; see also *Osgood v. Franklin*, 2 Johns. Ch., 27, and 14 Johns. R., 527.

guilty of gross negligence in not ascertaining the true value of the land, they will be held responsible for any deficiency.¹ But where there are doubts as to the power of the trustees to sell so as to affect the price, causing the land to bring less, this will not affect the rights of the purchaser, even though prudence would have required the trustee to have applied to the court for direction.²

In New York it is held that, in general, a naked power, to sell and reinvest, or to sell for a certain sum, can only be exercised by a sale for cash.³ But a sale where the purchase money is secured by mortgage, is believed to be unobjectionable in Pennsylvania, for by it a better price can generally be obtained; but a sale on personal security is at the trustee's own risk,⁴ and the Orphans' Court cannot direct a sale for the payment of debts except for cash.⁵ The contract for sale must not be entered into under circumstances of haste or improvidence.⁶ Thus, it is a breach of trust for a trustee, for the payment of debts, to sell where his grantor had only an equitable interest; but, with the right to the legal title, he ought first to have procured the conveyance of the legal title.⁷

¹ *Ringgold v. Ringgold*, 1 Harr. & Gill., 11; *Quackenbush v. Leonard*, 9 Paige, 347.

² *Goodrich v. Procter*, 1 Gray, 567.

³ *Waldron v. McComb*, 1 Hill, 111; S. C., 7 Hill, 335; *Ives v. Davenport*, 3 Hill, 373.

⁴ *Swoyre's Appeal*, 5 Barr, 377.

⁵ *Davis' Appeal*, 14 Penn. St. Rep., 372.

⁶ *Ord v. Noel*, 5 Madd., 410; *Rossett v. Fisher*, 11 Gratt., 492; *Hill on Trustees*, 479.

⁷ *Rossett v. Fisher*, 11 Gratt., 492.

Where there have been any irregularities in the exercise of the power of sale, a stranger or wrong doer has no right to object;¹ and where the *cestuis que trust* waive them, the purchaser cannot refuse to complete his bargain on account thereof²: and in favor of meritorious claimants, there is a general presumption that the proceedings have been regular.³

¹ Hillegass v. Hillegass, 5 Barr, 97; Gary v. Colgin, 11 Alab., 514.

² Schenck v. Ellingwood, 3 Edw. Ch., 175; Greenleaf v. Queen, 1 Peters' S. C., 146.

³ Marshall v. Stevens, 8 Humph., 159.

CHAPTER VII.

THE ESTATE OF A TRUSTEE.

SECTION I. WHEN ANY LEGAL ESTATE VESTS IN THE TRUSTEE.

In general, the trustee is one in whom the legal estate of property real or personal is vested, to be held for the benefit of another; hence, at law, the trustee is regarded as the legal owner of the property. This rule, perhaps, would have been without exception, had it not been for the effect of the various statutes enacted upon this subject. But owing to the many abuses which had crept in, and to which allusion has already been had,¹ the Statute of Uses was passed with the view of preventing the trustee from taking any interest at all in such cases, and conferring the legal as well as equitable interest or ownership at once upon the one to whom the beneficial enjoyment was given.² This statute provided that where any person should be seised of lands, &c., to the use, confidence or trust of any other person or body politic, the person or corporation entitled to the use in fee simple,

¹ See ante, Express Trusts; 4 Kent's Com., 294, 296.

² See Story's Eq., sec. 970; 2 Black. Com., 330; Will. Eq., 410; Stat. Uses, 27 Henry VIII.

fee tail, for life or years, or otherwise, should thence forth stand, or be seised or possessed of the lands, &c., of and in the like estate, as they have in the use, trust or confidence; and that the estate of the person so seised to uses shall be deemed to be in him or them that have the use in such quality, manner, form or condition as they had before in the use.¹

By this statute, uses were designed to be abolished by being converted into legal estates in the beneficiary; but owing to the construction put upon it by the judges, that intent was in a manner defeated; and there were three methods by which uses might be created and sustained, notwithstanding the statute. The first method was by the limitation of a use upon a use. Thus, in the limitation of an estate to A. and his heirs, to the use of B. and his heirs, in trust for D., Courts of Equity held that the intention of the grantor or donor must be supported; and, as it was evident that B. was not intended to take the beneficial interest, his conscience was affected, and therefore he must be treated as the trustee of D. The second rule was, where copyhold or leasehold estates were limited by deed or will to a person upon any use or trust.² It was resolved by all the judges in the 22d of Elizabeth, that the word "seised" was only applicable to freeholds; consequently, the statute did not apply to those estates of which no *seisin* could be

¹ 2 Fonb. Eq., B. 2, ch. 1, sec. 3, note; Bac. Abr., tit. Uses and Trusts.

² Bac. Us., 355; 2 Bl. Com., 336; 1 Cruise Dig., tit. 12, ch. 1, sec. 4 to 36.

had, such as copyholds or terms of years, &c.¹ The third principle of construction by which uses were sustained was, that whenever it became necessary to vest the legal estate in the donee to uses to enable him to perform the duties with which he was entrusted, equity would consider the legal estate so vested.² Thus, under the operations of this statute—which has been substantially enacted in many of the States—and the construction given to it by the courts, it often becomes difficult to determine the nature and extent of the estate vested in the trustee. An examination of a few of the cases arising under these rules of construction, will present to view the principle by which the estate of the trustee is measured and determined.

The reason why a use limited upon a preceding use did not come within the provisions of the statute was, that the first *cestui que use* could not be said to be seised to the use, therefore it was held that the legal estate was executed in the first *cestui que use*, and consequently he became a trustee of the person to whose ultimate use the trust was limited.³

¹ Hill on Trustees, 230; Gilb. Us., 67, n.; Pow. Dev., 232; Cowp. R., 709; 1 Cruise Dig., tit. 11, ch. 3, sec. 22.

² Keene v. Deardon, 8 East, 248; Chamberlain v. Thompson, 10 Conn., 244; Bagshaw v. Spencer, 1 Ves., 142; in U. States, see Brewster v. Striker, 2 Coms., 19; Norton v. Leonard, 12 Pick., 157; Striker v. Mott, 2 Paige, 387; Vail v. Vail, 4 Paige, 317; Morton v. Barrett, 22 Maine, 261; Wood v. Wood, 5 Paige, 596; Ashurst v. Given, 5 Watts & Serg., 323; Reformed Dutch Ch. v. Veeder, 4 Wend., 494; Ramsey v. Marsh, 2 McCord, 252; Vander Volgen v. Yates, 3 Barb. Ch., 243.

³ Tyrell's Case, Dyer, 155; 4 Kent's Com., 302; Lord Mansfield in Burgess v. Wheate, 1 W. Black. Rep., 160; 2 Bl. Com., 336; Cruise Dig., tit. 12, ch. 1, sec. 4; Wilson v. Cheshire, 1 McCord's Ch. Rep., 233.

After the enactment of the Statute of Uses, says Blackstone, "the power of the Court of Chancery over landed property was greatly curtailed and diminished. But one or two technical scruples which the judges found it hard to get over, restored it with tenfold increase. They held, in the first place, that no use could be limited on a use;" and that where a man bargains and sells his land for money, which raises a use by implication to the bargainee, the limitation of a further use to another person is repugnant, and therefore void.¹ And therefore, on a feoffment to A and his heirs, to the use of B and his heirs, in trust for C and his heirs, they held that the statute executed only the first use, and that the second was a mere nullity; not advertent that the instant the first use was executed in B, he became seised to the use of C, which second use the statute might as well be permitted to execute as it did the first; and so the legal estate might be instantaneously transmitted down through a hundred uses upon uses, till finally executed in the last *cestui que use*."² But by the decisions of courts of law, treating the second use as a nullity, it became evident that the intention of the grantor or donor, was defeated by giving to the *first cestui que use* the benefit intended for the *second*,³ and to remedy this, Chancery interfered and raised a trust for the intended beneficiary. Therefore, in the language of

¹ 1 And., 37, 136.

² 2 Bl. Com., 335.

³ 2 Bl. Com., 336; Cruise Dig., tit. 12, ch. 1, sec. 5; see also note 1 in Greenl. Cruise, tit. 12, ch. 1, sec. 4, (2d ed.)

Mr. Cruise,¹ "a trust is a use not executed by the statute of 27 Henry VIII."

Upon the same principle, where lands are conveyed by covenant to stand seised, bargain and sale, or by appointment under a power, to A and his heirs, to the use of B and his heirs, the legal estate will vest in A, as trustee for B; for in these instances the conveyance does not operate by transmutation of the *seisin* to A, but merely passes the use to him, while the *seisin* remains in the original owner.² But where one seised of lands, covenants, in consideration of blood or marriage, that he will stand seised of the same, to the use of his child, wife or kinsman, for life, in tail or in fee, the statute executes at once the estate; for the party intended to be benefited, having thus acquired the use, is thereby put into corporal possession of the land.³ The only consideration which will support a covenant to stand seised, are blood and marriage; therefore if one should covenant to stand seised to the use of himself for life, with remainders to the use of trustees, who are not his relations, for the purpose of preserving contingent remainders, with remainder to his first and other sons, in tail, &c., no use would vest in the trustees, because the consideration, blood or marriage, does not extend to them. And this is the principle reason why covenants to stand seised are fallen into disuse.⁴ It

¹ Dig., tit. 12, ch. 1, sec. 2.

² Hill on Trustees, 230; 1 Sugd. Pow., 10, 240, (6th ed.); Gill. Us., 67, 347, n.; 1 Cruise Dig., tit. 12, ch. 1, sec. 9; 16 Johns., 304.

³ 2 Bl. Com., 338; Bac. Us., 151.

⁴ 2 Black. Com., 238, Chitty's note; also 2 Sand. Us. and Trusts, 82.

should be observed that it is not by the words, but by the *nature* of the instrument that this effect is produced; for if a man, for the consideration of natural love and affection, bargain and sell his lands to the use of his wife, &c., it is a covenant to stand seised to uses, and, without enrollment, vests the estate in the wife, &c. So, likewise, if for a pecuniary consideration he covenant to stand seised to the use of a stranger and the deed be properly enrolled, it is a good and valid bargain and sale, &c.¹

Cruise, in his Digest of the law relating to real property,² states the following circumstances as necessary to the execution of a use under the statute of 27 Henry VIII: "1. A *person seised* to the use of some other person; 2. A *cestui que use in esse*; and, 3. A *use in esse* in possession, remainder, or reversion." Therefore, in examining the question whether a particular use has been executed by the statute, the first enquiry is whether these three circumstances exist; and the student will find himself much aided by consulting Cruise, chap. 3, tit. 11, on these questions.

This doctrine of the English Statute of Uses, has been generally recognized in the jurisprudence of the United States. In South Carolina it has been adopted in express terms,³ and in Indiana,⁴ Illinois,⁵

¹ 2 Bl. Com., 338, Archbold's note; 7 Co., 40, *b*; 2 Inst., 672; 1 Leon., 25; 1 Mod., 175.

² Tit. 11, ch. 3, sec. 5.

³ S. C. Statutes at Large, Vol. II., p. 467.

⁴ Ind. R. Stat., 1843, p. 447, sec. 181.

⁵ Ill. R. Stat., 1839, p. 148.

and Missouri,¹ in substance. This statute was part of the colonial law of the State of Virginia, until the general repeal of all the British statutes in 1792, and was partially supplied by the provisions of the Revised Code,² which provides that in deeds of "bargain and sale," "covenants to stand seised," and of "lease and release," the possession of the bargainor, &c., shall be transferred to the bargainee, &c., for the interest that the party has in the use, as perfectly as if the latter had been enfeoffed with livery. Under this statute, the possession is transferred to the use only in the cases enumerated.³ Lomax, in his Digest,³ remarking upon this statute, says: "To give to the words of this act a meaning co-extensive with the English statute, so as to include every case where there may be found a seisin in one person and a use in another, seems to be unwarranted by any rule of statutory interpretation, nor is there apparent any principle of policy so imperious as to require so free a construction of plain, unambiguous language. Of the three cases which are specified in the act, in which the law operates to execute the seisin to the use, two of them are plainly cases where there is a declaration of use without the transmutation of possession, viz: bargain and sale and covenants to stand seised. In the other case of the lease and release, it is the release which is the operative part of the convey-

¹ Mo. R. Stat., 1845, p. 218, ch. 32, sec. 1.

² Ed. 1849, p. 502; Statute of Feb. 24, 1819, (Vol. I., p. 370, sec. 29, Rev. Code,) p. 502, sec. 14.

³ 1 Lomax Dig., 188; *Bass v. Scott*, 2 Leigh, 359.

ance, and was at common law entirely effectual to enlarge the estate and possession of the lessee into the measure of the freehold released. The act of the Legislature could give no additional efficacy to the release, and it is presumed that it was for no such purpose that the lease and release were enumerated with the other two assurances. The purpose of the Legislature was doubtless in contemplation of the lease alone, to make that effectual as it had been under the statute of Henry VIII, by virtue of the consideration for raising a use, although there had been no actual entry. The Legislature may have intended a rule applicable to every demise, whether by bargain and sale, or by common law lease, or by any other species of assurance, so that, if followed by a release, the lessee, whether he had entered or not, should be invested with the possession as effectually as if enfeoffed with livery of seisin. If this be the correct explanation of our statute, its provisions are only intended to apply to cases where uses are created without transmutation of possession, and seems purposely to have refrained from all that class of cases where there has been a transmutation of possession. It has been said, in the Court of Appeals, that we (Virginia) have no general statute of uses; and it was held, where a use was devised in land, the seisin was not executed to the use, because devises were not among the conveyances enumerated in the act.¹ Except, therefore, in the cases of bargain and sales, lease and

Bass v. Scott, 2 Leigh, 359.

release, and covenants to stand seised to uses, it seems that all other uses are to be regarded as unexecuted, as they were prior to the statute of 27 Henry VIII. These unexecuted uses will comprehend such as are raised by feoffments to uses, releases and other conveyances operating by transmutation of possession, devises, resulting uses and uses by implication. In all these cases, consequently, the uses will remain as equitable estates, of the same nature as trusts, and not cognizable in courts of law."¹ Similar enactments are found in the statutes of North Carolina,² Kentucky,³ Mississippi,⁴ and Florida.⁵ The Revised Code of Delaware⁶ provides generally that lands may be transferred by deed without livery, and that the legal estate shall accompany the use, and pass with it. In New York,⁷ Wisconsin,⁸ and Michigan,⁹ uses and trusts, except so far as they are particularly authorized or modified by statute, are abolished. The effect of these provisions is to convert all mere naked or passive trusts, and most active ones, into mere powers, except in cases where the legal estate and actual possession are required for the purposes of the trust.¹⁰

¹ 1 Lomax Dig., 188.

² Rev. Stat., 1836, Vol. I., ch. 43. sec. 4, p. 259.

³ Rev. Stat., 1834, Vol. I., p. 443, sec. 12, Moorhead & Brown.

⁴ How. & Hutch. Dig., p. 349, ch. 34, sec. 28.

⁵ Thomp. Dig., p. 178, sec. 4.

⁶ 1852, p. 266.

⁷ 1 Rev. Stat., p. 728.

⁸ Rev. Stat., p. 318.

⁹ Rev. Stat., 1846, ch. 63. sec. 1.

¹⁰ See 4 Kent's Com., 294, and notes, and 299; *Vander Volgen v. Yates*, 3 Barb. Ch., 243; *Reformed Dutch Ch. v. Veeder*, 4 Wend., 494.

As for the doctrine of the Statute of Uses in New Hampshire, Massachusetts and Connecticut see authorities cited.¹ Whether the rule laid down in Tyrrell's case is to be regarded as a rule of construction in the United States, see Mr. Greenleaf's note (1), sec. 4, chapter 1, title 12, Cruise's Digest, second edition.

In Ohio and Vermont the Statute of Uses seems never to have been in force, and consequently they stand as before the statute of 27 Henry, VIII.² In Rhode Island, every deed and covenant to stand seised, transfers the possession to the *cestui que use*, without further ceremony.³ Mr. Greenleaf, in his note to Cruise,⁴ remarks, "that in most of the States statutes have been passed expressly regulating conveyances, and providing, in substance, that deeds, executed in the prescribed manner shall be valid to pass the estate to the grantee without any other formality. Such is the case in Massachusetts, Maine, New Hampshire, Vermont, Virginia, North Carolina, Kentucky, Mississippi and Pennsylvania. That Delaware had gone so far as to enact, in general terms, that the legal estate shall, in all cases, accompany the use and pass with it;"⁵

¹ Chamberlain v. Crane, 1 N. H., 64; Exeter v. Odiorne, *ibid*, 237; French v. French, 3 N. H., 239; Marshall v. Fisk, 6 Mass., 31; Norton v. Leonard, 12 Pick., 156; Bryan v. Bradley, 12 Conn., 474; Northampton Bank v. Whiting, 12 Mass., 104.

² Thompson v. Gibson, 2 Ohio Rep., 439; Helfeinstine v. Garrard, 7 Ohio Rep., 275; Gorham v. Daniels, 23 Vt., 600.

³ R. I. Rev. Stat., 1844, p. 260.

⁴ *Ut supra*.

⁵ R. Stat., 1829, p. 89, sec. 1.

and New York has declared¹ that the party entitled to the possession and receipt of profits shall be deemed to have the legal estate to the same extent as the equitable interest. And a provision substantially similar exists in Indiana.² In all these States, therefore, deeds of conveyance derive their effect, not from the Statute of Uses, but from their own statutes of conveyances, operating nearly like a feoffment with livery of seisin to convey the land, and not merely to raise a use to be executed by the Statute of Uses. Hence, it would seem that in these States a use may well be limited on a use, and the original intent and principle of the Statute of Uses be allowed to have its free and unrestrained operation, and to convey the legal estate by its electric energy to the remotest use, when not arrested by any permanent intervening trust. Such operation has already been admitted in deeds of bargain and sale, and is virtually conceded in the rule that deeds of conveyance, in whatever form, may be treated as any species of conveyance which will best effectuate the intent of the parties.”³ “The rule in *Tyrrell’s* case was expressly disapproved by Dana, Ch. J., in *Thatcher v. Omans*.”⁴

In cases of devise the rule of construction is held to be the same as other conveyances. Thus, where real estate was devised to trustees and their heirs,

¹ 1 R. S., 727, § 47.

² R. Stat., 1843, ch. 28.

³ *Davis v. Hayden*, 9 Mass., 514; *Higbee v. Rice*, 5 Mass., 352; *Pray v. Price*, 7 Mass., 381; *Knox v. Jenks*, 7 Mass., 488; *Flint v. Sheldon*, 13 Mass., 443; *Marshall v. Fisk*, 6 Mass., 24.

⁴ 3 Pick. Supp., 528.

to the use of them and their heirs, upon several trusts, it was declared by Lord Hardwick that the legal estate was vested in the trustees, and the subsequent devisees took only equitable interests, the same as lands conveyed in settlement to trustees and their heirs, to the use of them and their heirs, to the use of A. B.”¹

The rule, *that the legal estate will vest in the donee to uses, provided it be requisite, to enable the donee to perform the duties with which he is entrusted*, is a very obvious one. For, if the trustee is required to perform any act, it is plain that he should have sufficient power to perform it. Hence the rule, “Trustees must, in all cases, be presumed to take an estate commensurate with the charges or duties imposed on them.”² Thus, a conveyance or devise of real estate to trustees and their heirs, to sell or mortgage the same for the payment of debts, or with the money to purchase other lands to be settled to certain uses, vests the legal estate in the trustees, and not in the person to whom the use is subsequently limited.³

So, where there are gifts of real estate to trustees,

¹ Whetstone v. Bury, 2 P. Wms., 146; Hopkins v. Hopkins, 1 Atk., 581; Vide, Att’y Gen., v. Scott, Forrest R., 138; Venables v. Morris, 7 T. R., 342, 438; Doe v. Hicks, 7 T. R., 433; Colmore v. Tyndall, 2 Yo. & Jerv., 605.

² Deering v. Adams, 37 Maine, 264; Richardson v. Woodbury, 43 Maine, 206; Lord Ellenborough, in Trent v. Hanning, 7 East, 99; Doe v. Willan, 2 B. & Ald., 84; Gibson v. Montfort. 1 Ves., Sr., 405; Hill on Trustees, 231, Wharton’s note (1); Ellis v. Fisher, 3 Sneed, 231; Brewster v. Stryker, 1 E. D. Smith, 321; Neilson v. Lagow, 4 Ind., 607; Ward v. Amory, 1 Curtis Ct. Ct., 419; Coulter v. Robertson, 24 Miss., 278.

³ Keene v. Deardon, 8 East, 248; Bagshaw v. Spencer, 1 Ves., 142; Chamberlain v. Thompson, 10 Conn., 244; 1 Cruise Dig., tit. 12, ch. 1. sec. 21; see also Brewster v. Striker, 2 Coms., 19; Burr v. Sim., 1 Whart., 252.

with a direction to convey, or to pay the rents and profits to certain persons, or to receive the rents and apply them, &c., it has been held that the legal estate is necessarily in the trustee to enable him to perform such duties.¹ It is a well settled principle that the estate of a devisee in trust will not be taken from him by the execution of the use, contrary to the intention of the testator to be gathered from the will itself,² and this intent may be manifested by requiring the trustee to perform some act, either relating to the estate and the manner in which the *cestui que use* is to enjoy its benefits, or it may not relate to such ulterior object. Thus, where a trust to sell is plainly created, or where a devise is made in trust to raise money to be applied to collateral purposes, with remainder to use of the *cestui que use*, it is manifest that the testator intended the estate should vest in the trustee.³ Thus, also, where money is to be raised out of lands for the payment of debts or legacies, if it appear the testator intended that the trustee or executor should be *active* in the payment of the money, the estate will be vested in the trustee.⁴ Fletcher, on Trustees,⁵ lays down this rule: "Where trustees are directed to do any acts relating to the land devised, which

¹ Garth v. Baldwin, 2 Ves., 645; Mott v. Buxton, 7 Ves., 201.

² Fletcher on Trustees, 19; Goodtitle v. Whitby, 1 Burr., 228; Doe v. Field, 2 B. & Ad., 564; Stanley v. Stanley, 16 Ves., 491.

³ 1 Eden, 125; Bagshaw v. Speneer, 1 Ves., Sr., 142; Rodgers v. Gibson, Ambl., 95; Gregory v. Henderson, 4 Taunt., 772; see also 2 Pow. Dev., by Jarm. 8; 2 Salk., 679; 11 East, 377; Doe v. Woodhouse, 4 T. R., 89.

⁴ Ellis v. Fisher, 3 Sneed, 231; Brewster v. Striker, 1 E. D. Smith, 321.

⁵ Page 27.

are usually performed by the legal tenant, the testator's intention will be taken to be, that they are to retain the legal estate, and consequently, it will not be executed in the *cestui que trust*.¹

Where the question of intent turns upon the *nature* of the duty to be performed, a distinction is made between a trust which carries with it some legal estate or interest in the land, and a *bare power* or authority to sell; and the rule is, that where the duty to be performed may be sufficiently accomplished by the exercise of a *bare power* or authority, the will is to be construed as creating nothing more than such power and authority, unless more is expressly given, since the heir is not to be disinherited by such construction.²

Upon the principle of effectuating the intention of the testator, where an estate is devised to trustees for the *separate use of a married woman*, the devise will, if possible, be construed so as to vest the legal estate in the trustees; because by such construction, the palpable intention of the testator will be more certainly carried out.³ Thus, an estate was devised to trustees and their heirs, upon trust, to permit the testator's niece, who was a married woman, to receive the rents during her life, for her

¹ See preceding note.

² Fletcher on Trustees, 11, 12; Cruise Dig., tit. 12, ch. 1, sec. 14, n. (1), (2d ed.) by Greenleaf; Sugd. Pow., 106; 1 Chan. Pow., 62; Fay v. Fay, 1 Cush., 93.

³ Cruise Dig., tit. 12, ch. 1, sec. 16; Neville v. Saunders, 1 Vern., 415; 1 Ab. Eq., 383; Harton v. Harton, 7 T. R., 652; Bass v. Scott, 2 Leigh, 256; Bush v. Allen, 5 Mod., 63; Robinson v. Grey, 9 East, 1; see also Say and Sele v. Jones, 1 Eq. Ca. Abr., 383; 1 Cruise Dig., tit. 12, ch. 1, sec. 14, note.

separate use, Lord Kenyon said, that whether this were a use executed in the trustees or not, must depend upon the intention of the devisor, This provision was made to secure to a *feme covert* a separate allowance, to effectuate which it was essentially necessary that the trustees should take the estate which the use executed; for otherwise the husband would be entitled to receive the profits, and so defeat the object of the devisor.¹

It has already been remarked that where lands are devised or conveyed by deed to trustees in trust, to sell or mortgage them, in order to raise money for payment of debts, and subject thereto in trust for a third person, the trustees will take the legal estate, to enable them to perform their duties; and although the direction for the payment of debts, &c., out of the proceeds of the land, is *only in aid of the personal estate*, the trustees will take the legal estate immediately, independently of the fact of its eventual applicability.² If, however, the charge of debts upon the real estate is expressly contingent upon the insufficiency of the personalty, or any other fund designated for the payment in the first instance, the trustees will not take an immediate legal estate;³ for a mere charge of debts or legacies

¹ *Harton v. Harton*, *ut supra*; see also *McNish v. Guerard*, 4 Strob. Eq., 75; *Bass v. Scott*, 2 Leigh, 356; *Franciscus v. Reigart*, 4 Watts, 109; *Rogers v. Ludlow*, 3 Sandf. Ch., 104; *Escheater, &c., v. Smith*, 4 McCord, 452; *Ayre v. Ayre*, 16 Pick., 327; *Williams v. Holmes*, 4 Rich Eq., 475; *Ware v. Richardson*, 3 Maryl. R., 505.

² *Hill on Trustees*, 232; 1 Jarm. Pow. Dev., 224, n.; 18 Ves., 395, 413.

³ *Goodtitle v. Knott*, Coop., 43; *Hawker v. Same*, 3 B. & Ald., 537; see 1 Ves., 485.

on real estate, will not of itself vest the legal estate in the trustees, unless they are expressly directed to pay them.¹ We have seen that where real estate is given to trustees with a direction to convey, pay rents and profits to certain persons, or to receive and apply rents, &c.,² that the legal estate is necessarily vested in the trustees. But a distinction is made where the direction to the trustee is *not to pay over the rents and profits*, to another, but to *permit and suffer* such other to receive them; because in the former case, the trustee must necessarily receive them, and hence, take the legal estate; while in the latter case, there being no such necessity, the legal estate will be vested, by the statute, in the person who is to receive the rents and profits.³ The intention of the testator, as it is gathered from the will itself, however, must prevail, notwithstanding any particular form of expression. Thus, notwithstanding the will direct the trustees to *permit and suffer* another person to receive the rents and profits, yet if any additional duty, imposed upon the trustee by the will, make it necessary that he be vested with the legal estate, he will be so vested, and the above distinction will not prevail.⁴ There is a class of

¹ Hill on Trustees, 231; Jarm. Pow. Dev., 224, n.; Cruise Dig., tit. 12, ch. 1, sec. 32.

² Garth v. Baldwin, 2 Ves., 645; Mott v. Buxton, 7 Ves., 201.

³ Hill on Trustees, 233; Broughton v. Langley, 2 Ld. Raym., 873; see 2 Taunt., 109; 12 East, 455; 4 Taunt., 772; see Parks v. Parks, 9 Paige, 107; Ramsey v. Marsh, 2 McCord, 252; Barker v. Greenwood, 4 M. & W., 429.

⁴ Cruise Dig., tit. 12, ch. 1, sec. 25; Keene v. Deardon, 8 East, 248; Hill on Trustees, 346; see Vanderheyden v. Crandall, 2 Denio, 9; Barker v. Greenwood. *ut supra*; White v. Parker, 1 Bing. N. C., 573; New Parish v. Odiorne, 1 N. H., 232.

doubtful cases where there is an express devise to trustees, but the devise seems to depend upon a contingency which has failed. Thus, where a testator, in case his personal estate should not be sufficient to pay his debts, gave his real estate to his executors in trust, to pay his debts, and to pay the residue over to others. This was held to be a *contingent devise in trust*; and the personal estate proving sufficient to pay the debts, nothing passed to the executors, because the contingency never happened, on which alone they were to take. But where the testator devised all his lands to his executors in trust to pay certain legacies thereout, in case the personal estate was not sufficient. In this case the devise was absolute, and the *trust was contingent*. In the latter case the executors took the estate. Hence, the distinction between *contingent gifts* in trust, and gifts upon *contingent trusts*.¹

SECTION II. THE NATURE AND QUANTITY OF THE ESTATE VESTED IN THE TRUSTEE.

The next inquiry is, what is the nature and quantity of the estate in the trustee, where any has passed? This is to be determined by the manifest intent of the party creating the trust. Hence the first leading rule, "Trustees must in all cases be presumed to take an estate commensurate with the charges or duties imposed on them."² Therefore,

¹ 1 Cruise Dig., tit. 12, ch. 1, sec. 14, note; (2 B. & C., 357; 3 Dow. & Ry., 764; 2 Brod. & B., 623; 3 B. & C., 161.)

² Trent v. Hanning, 7 East, 99; Gibson v. Montfort, 1 Ves., Sr., 405; Doe v. Willan, 2 B. & Ald., 84; Ellis v. Fisher, 3 Sneed, 231.

where land is devised to trustees, they will take the legal estate whenever it is necessary in order to effect the purposes of the trust.¹ So, also, where lands are devised for a particular purpose, without words of inheritance, and the death of the devisee may defeat the object of the devise, he will take the fee.²

A second rule is, "Trustees must not, in general, be allowed, by mere construction or implication, to take a greater estate than the nature of the trust demands; for this would disinherit the heir, which is always, as far as possible, to be avoided."³ Hence, the estate of trustees will be confined and restricted to such partial or less extensive interest than that indicated by the language of the trust, as will be sufficient to carry out the purposes of the trust.⁴ Thus, although the devise were expressly to the *trustees and their heirs*, if the duties imposed on the trustees only require an estate *per autre vie* to be

¹ 1 Cruise Dig., tit. 12, ch. 1, sec. 14, note by Mr. Greenleaf; Ellis v. Fisher, 3 Sneed, 231; Brewster v. Striker, 1 E. D. Smith, 321.

² 8 Vin. Abr., 262, cites Shaw v. Wright, 1 Eq. Ca. Abr., 176, pl. 8; see Cruise Dig., tit. 12, ch. 1, sec. 14, note; Upham v. Varney, 15 N. H., 462; Ward v. Anory, 1 Curt. Ct. Ct. R., 419; Newhall v. Wheeler, 7 Mass., 189; Stearnes v. Palmer, 10 Met., 35; Gould v. Lamb, 11 Met., 84; Brooks v. Jones, ib., 191; Cleavland v. Hallett, 6 Cush., 403; King v. Parker, 9 Cush., 71; Norton v. Norton, 2 Sandf. Sup. Ct., 296; Williams v. First P. Soc. Cin., 1 Ohio St. R., 478; Nichol v. Walworth, 4 Denio, 385; Hawley v. James, 5 Paige, 318; Deering v. Adams, 37 Maine, 265; Webster v. Cooper, 14 How. U. S., 499; Gill v. Logan, 11 B. Monr., 233; Comby v. McMichael, 19 Alab., 751.

³ Cruise Dig., Greenleaf's note, tit. 12, ch. 1, sec. 14; per Heath, J., in Doe v. Barthorp, 5 Taunt., 385; per Ellenborough, in Doe v. Simpson, 3 East, 171, 172.

⁴ Hill on Trustees, 239.

vested in them, their legal interest will be cut down to that extent.¹ This rule, however, is not an independent principle of construction. It only applies in cases of doubt or uncertainty as to the intention of the one raising the trust. For, wherever, from the face of the will, it is apparent that the testator meant to give a fee to the trustees, they will take the fee, although the purposes of the trust might have been effected by the grant of a lesser estate.² All these cases are to be determined by the will of the testator. "If his object can be effected by allowing the statute of uses its full operation, and vesting the estate immediately in the objects of his bounty, it is so done, provided he has not expressed a different intention. If he has designated any duty to be *actively* performed by the trustee, in relation to the land, and has not declared the nature of the estate which the trustee is to take, the law declares it for him, by presuming he intended to grant an estate just sufficient to effect his ulterior purpose, and no more. But if he has expressly limited the estate to be taken by the trustees, the law merely sanctions the intent so expressed, and aids the trustee in performing the trust only so far as the testator has enabled him to perform it."³

¹ Lord Say and Sele *v.* Jones, 1 Eq. Ca. Abr., 383; Sharpland *v.* Smith, 1 Bro. C. C., 75; Doe *v.* Hicks, 7 T. R., 433; Balgrave *v.* Balgrave, 4 Exch., 569; Watson *v.* Pearson, 2 Exch., 593; Warter *v.* Hutchinson, 5 Moore, 153.

² Cruise Dig., tit. 12, ch. 1, sec. 14, Greenleaf's note; see also Watson *v.* Pearson, *ut supra*; Belgrave *v.* Belgrave, *ut supra*; Loveacres *v.* Blight, Cowp., 352; Bagshaw *v.* Spencer, 1 Ves., Sr., 142; but see Warter *v.* Hutchinson, 1 B. & C., 721, 747.

³ Greenleaf's note to Cruise Dig., tit. 12, ch. 1, sec. 14.

An examination of the authorities will show this principle to be well established; that the estate devised to trustees will be either *restricted or enlarged, as the exigencies of the trust require*; and this without regard to the technical language used by the testator, provided his intent can be gathered from the will itself. In the case of *Chapman v. Blissett*,¹ the testator had devised his real and personal estate to three *trustees their heirs and assigns*, in trust to pay his son an annuity quarterly; the residue of the rents to be applied, during the life of his son, for the education of his son's children; then he gave one moiety of the estate to the children of his son, and the other moiety to the children of his grandsons. On the question as to the nature or continuance of the estate of the trustees, Lord Talbot said, the whole depended upon the intention of the testator whether the entire legal estate should *continue* in the trustees, or whether only for a *particular time and purpose*. Where particular things are to be done by trustees, it was necessary that the estate should remain in them so long at least as those particular purposes required it.¹

So, likewise, in the case of *Lord Say, &c., v. Jones*,² the testator had devised lands to *trustees and their heirs* in trust to pay legacies and annuities therein named, and then to pay the surplus rents into the

¹ Forr., 145; S. C., Talb. Cas. Temp., 145, 150.

² 1 Eq. Cas. Abr., 383; *Robinson v. Grey*, 9 East, 1; *Ware v. Richardson*, 3 Maryl. R., 505; see *Goodtitle v. Whitby*, 1 Burr., 228; *Warter v. Hutchinson*, 1 B. & Cr., 721; *Stanley v. Stanley*, 16 Ves., 491; *Glover v. Monkton*, 3 Bingh., 13; see Hill on Trustees, 240, and authorities.

hands of a *feme covert*; and after her death, to stand seised to the use of the heirs of her body. Notwithstanding the words of the devise, the court held that the intent of the testator was effectuated, by vesting in the trustees the legal estate during the life of the *feme covert*, and after her death vesting it in the heirs of her body; and it was so decreed, which decree was affirmed by the House of Lords.¹

So, likewise, the estate of the trustee has been enlarged by the construction of the court, where the exigencies of the trusts seemed to require it. Thus, a devise of real estate to trustees in trust to sell, and without any words of limitation being added, has been held to pass the fee to the trustees; because the exigency of the trust required it.² So, likewise, a devise in trust to convey or lease, at discretion, would pass the fee; for a less estate would not answer the purpose.³

But, as has already been stated, the estate of the trustee will not be enlarged so as to disinherit the heir, unless the general nature and object of the trust so require it. Therefore, where an estate is limited in express terms to the trustees, their executors, administrators and assigns, for the payment of annuities, debts, legacies, &c., if a chattel interest will answer the exigencies of the trust, no larger estate

¹ See preceding note.

² See *Doe v. Howland*, 7 Cow., 277; *Jackson v. Robins*, 16 Johns., 537; *Hill on Trustees*, 242; *Shaw v. Weigh*, 1 Eq. Ca. Abr., 184; *Gibson v. Lord Montfort*, 1 Ves., 191; also *Amb.*, 93; see *Chamberlain v. Thompson*, 10 Conn., 244; *Watson v. Pearson*, 2 Exch., 594; *Bagshaw v. Spencer*, 1 Ves., 144.

³ *Doe d. Booth v. Field*, 2 B. & Ald., 554; *Doe d. Keen*, id.

will vest in the trustees.¹ Thus, where a tenant for life under a will, was empowered to limit or appoint all or any part of the estate to trustees, upon trust, by the rents and profits thereof to raise and pay a yearly rent charge as a jointure for his wife. The tenant for life exercised this power by deed, appointing the estate of trustees and their heirs in trust, by the rents and profits to raise and pay a jointure rent charge of £500. The Judges of the Court of Kings Bench, on a case sent to them, certified that the trustees took an estate in fee.² The Judges of the Common Pleas, on the same question being sent to them, were of the opinion that the trustees took no legal estate.³ Lord Eldon, on the hearing of the cause, was of the opinion that the proper mode of securing the rent charge would have been by vesting in the trustees a term of ninety-nine years, if the jointress should live so long,⁴ and thus he would have held that they only took a chattel interest for a term of years, determinable on the death of the annuitant.⁵

From an examination of the authorities, it would seem that in all cases where there is a devise, without any words of limitation, to trustees, in trust, out of the rents and profits to pay debts or legacies,

¹ *Henderson v. Williamson*, 1 Keen., 41; 1 Jarm. Pow. Dev., 231, note;
⁴ Cruise Dig., tit. 38, ch. 9, sec. 9.

² 11 East, 458.

³ 3 Taunt., 316; see Hill on Trustees, 214.

⁴ 18 Ves., 395, 416.

⁵ See *Doe d. White v. Simpson*, 5 East, 162; *Henderson v. Williamson*, 1 Keen., 33-41; see *Gibson v. Lord Montfort*, 1 Ves., 491; *Ackland v. Luttey*, 9 Ad. & Ell., 879.

and where the payments can be made without sale or anticipation of the income necessary for that purpose, the trustees will take only a term of years sufficient for raising the necessary sums.¹

It sometimes happens that doubts arise as to the nature and extent of the estate of the trustee in the subject matter of the trust, owing to the insertion of powers of sale, &c. A power of sale may be given to trustees, either as appendant to the legal estate, and to take effect out of it, or the power may be a mere collateral authority, unaccompanied by any legal interest.² Thus, if a testator devise lands to his executors to sell, they take his legal estate accompanied with the power; but if the devise were, "that his executors shall sell" the land, they take *only a power*, and the legal estate vests in the heir by descent,³ and will remain there until divested by the execution of the power.⁴ Mr. Kent, in his Commentaries,⁵ after noticing the above principle, remarks, "the New York Revised Statutes have interfered with these distinctions, though they seem not to have settled them in the clearest manner. They declare⁶ that *a devise of land to executors, or other trustees, to be sold or mortgaged*, where the trustees are not also empowered to receive the rents and profits, shall vest no estate in the trustees; but

¹ Hill on Trustees, 246; 1 Pr. Wm., 589; 2 Vern., 404.

² Hill on Trustees, 471.

³ 1 Sugd. Pow., 128, (6th ed.); 4 Kent's Com., 320.

⁴ Earl Stafford v. Buckley, 2 Ves., 179; Warneford v. Thompson, 3 Ves., Jr., 513.

⁵ Vol. IV., p. 321.

⁶ N. Y. R. St., Vol. I., p. 729, sec. 56.

the trust shall be valid as a power, and the lands shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power."

"If the construction of this section be, that a devise of lands to executors to be sold, does not pass an interest, *without a special* authority to receive the rents, then the estate does not in any of the cases already mentioned, pass to the executors, and the devise is only a power simply collateral. The English rule is, that an estate may be conveyed to trustees to sell, with a provision that the rents and profits be, in the mean time, received by the party who would have been entitled if the deed had not been made, and yet the trustees will take a fee.¹ If the trust be valid as a power, then in every such case, the lands to which the trust relates, remain in, or descend to the persons entitled, subject to the trust as a power."² The statute,³ authorizes "express trusts to be created to sell lands, for the benefit of creditors, or for the benefit of legatees, or for the purpose of satisfying charges."⁴ These are the very trusts or powers relative to executors which we are considering; and by the same statute,⁵ "every express trust, valid as such in its creation, *except as therein otherwise provided*, vests the whole estate in the trustees, subject to the execution of the trust." The conclusion would seem to be, that, as a general

¹ Keene v. Deardon, 8 East, 248.

² N. Y. R. St., Vol. I., p. 729, sec. 59.

³ Ibid, Vol. I., p. 729, sec. 55.

⁴ See Gree v. Dikeman, 18 Barb., 535.

⁵ N. Y. R. St., Vol. I., sec. 60.

rule, every express trust created by will, to sell land, carries the fee with it. But if the executors *be not also empowered to receive the rents and profits*, they take no estate, and the trust becomes a power without an interest.¹ This restriction of the general rule applies to the case of a "devise of lands to executors to be sold or mortgaged," and the usual case of the direction in the will to the executors to sell lands to pay debts or legacies, is not within the liberal terms of the restriction; and it may be a question whether it be one of the cases in which, according to the 60th section above mentioned, "the whole estate is in the trustees."²

In Ohio it is held³ that a power given to executors to sell land, where they deem it can be done to good advantage, and distribute the proceeds, is a power with an interest, and entitles them to the possession of the land, though the fee, in the mean time, descends to the heir.⁴

It has also been a question whether estates limited in default of appointment, are to be considered as vested or contingent, during the continuance of the power. It is now settled that the estates so limited are vested, yet subject to be divested by the execution of the power.⁵

Where the object of the devise to trustees, in

¹ *Dominick v. Michael*, 4 Sandf. S. C. R., 374.

² *Harris v. Clark*, 3 Seld., 242.

³ *Dabney v. Manning*, 3 Ohio, 321.

⁴ See also Rev. Stat. Virginia, 1849, tit. 33, ch. 116, sec. 1; and see *Mosby v. Mosby*, 9 Watt. 584.

⁵ 4 Kent's Com., 324; *Doe v. Martin*, 4 T. R., 39; *Cunningham v. Moody*, 1 Ves., 174.

trust, is to preserve contingent remainders, and there are no words of limitation, they take an estate, *per autre vie*.¹

In England the uncertainty of the extent and duration of the estate in the trustee, and the inconvenience arising therefrom, was so great, that to remedy the matter, the "Will Act," 1 Vic. Ch. 26, was passed. By that act (30th sec.) it is provided that any devise of real estate—not being a presentation to a church—to a trustee or executor shall be construed to pass the fee simple, or other the whole estate or interest of the testator, unless a definite term of years, or an estate of freehold shall be given him expressly or by implication. It also further provides (31st sec.) that where real estate shall be devised to a trustee without any express limitation of the estate, and the beneficial interest shall not be given to any person for life, or if given for life, the purposes of the trust may continue beyond the life of the first *cestui que trust*, the trustee will take a fee simple and not an estate determinable on the satisfaction of the trust.²

Where the subject of the trust consists in personal estate, the general rule is, that the legal interest will pass to the donee in trust, by an assignment or bequest, and will remain there until the purposes of the trust are accomplished.³ In cases of *choses in action*, which are not assignable at law, the donee

¹ *Thong v. Bedford*, 1 Bro. C. C., 314; *Webster v. Cooper*, 14 How. U. S., 499.

² Take effect 1st Jan., 1838.

³ *Rice v. Burnett*, 1 Spear. Eq., 590; *Harley v. Platts*, 6 Rich L., 315.

in trust takes only the equitable interest, while the legal title remains in the assignor, and at his death will devolve upon his personal representatives, as trustee for the person beneficially interested. In equity the assignment is considered in the nature of a declaration of trust on the part of the assignor, and an agreement to permit his name to be used in an action at law to reduce the chose to possession.¹ Where, by custom or by statute, certain classes of choses in action are legally transferable by assignment or delivery, or both, where the assignment is perfected in due form, the legal title vests in the assignee in trust. In cases of executors, however, where the gift of the chose is by will, no legal title will vest in the donee in trust, until the executor assents to the bequest.² It sometimes becomes a difficult question, whether an executor, who has been appointed trustee by the same will, and who has proved the will, is to be treated as executor or trustee. Where the trust is created by the will, and the same person is appointed executor and trustee, the probate of the will by him will be deemed to be an acceptance of the trusts,³ except, perhaps, in those States where an executor is required, in addition to his oath and letters, to give security,

¹ Hill on Trustees, 236; 1 Mad. Ch. Pr., 686; 1 Williams' Ex'ors, 547; Story's Eq., sec. 1040, and authorities.

² Story's Eq., sec. 591, 1039; Deeks v. Strutt, 5 T. R., 690; Doe v. Gay, 3 East, 120; Hill on Trustees, 236. As to what will constitute an assent, see ante.

³ Booth v. Booth, 1 Beav., 128; Williams v. Nixon, 2 Beav., 472; Worth v. McAden, 1 Dev. & Batt. Eq., 209; Preble's Appeal, 15 S. & R., 39; Easton v. Carter, 5 Exch., 8.

before he is qualified to act. In such States a different rule obtains.¹ So, likewise, where by statute the trustee is required to give bonds, the giving bond as executor only, will be deemed a refusal to act as trustee.² But the difficulty arises, principally, on the question, where, in respect to the estate, the character of executor ceases and that of trustee begins. There seems to be no general rule applicable to all cases; but each case must depend upon its own peculiar circumstances. Wherever the fund is separated from the testator's property, and appropriated to the particular purposes of the will, the trust character has commenced. Thus, where a testator gave £400 to Buscall—afterwards appointing him executor—to invest and pay the dividends to a party for life, and finally to pay over the principal as directed by the will. The testator died in 1787. The executor paid all the debts and other legacies, and set apart the sum of £400 to answer the legacy in trust. The executor died in 1799, having appointed as his executor the defendant. In 1834 a bill was filed by the parties interested in the legacy of £400, against the defendant. The defendant, in his answer, admitted that the said sum of £400 had been set apart and invested by Buscall, on the trusts of the will, and that the same fund had been invested and the income received by himself, but plead the statute of limitations, as the suit

¹ *Monroe v. James*, 4 Mumf., 195; *Miller v. Meetch*, 8 Barr, 417; *Roseboom v. Mosher*, 2 Denio, 61; *Carter v. Carter*, 10 B. Monr., 327; *Trask v. Donoghue*, 1 Aik., 373.

² *Williams v. Cushing*, 34 Maine, 370; *Deering v. Adams*, 37 Maine, 265.



was brought to recover a legacy which was barred by the 40th section of the act of the 3d and 4th Will. IV, ch. 27. Lord Cottenham, the Chancellor, in deciding the case, remarked that the whole fallacy of the defendant's argument consisted in treating the suit as being brought to recover a legacy. That the fund ceased to bear the character of a legacy, as soon as it assumed the character of a trust fund. "Suppose," said his Lordship, "the fund had been given by the will to any body else, as a trustee, and not to the executor, it would then be clearly the case of a breach of trust. What he would have done by paying it to a trustee, he has done by severing it from the testator's property and appropriating it to the particular purposes pointed out by the will. It is impossible to consider the executor so acting, to be acting as executor, but as trustee." Therefore judgment was given for the plaintiffs.¹ Where the executor holds a legacy under the will, he will be considered as holding it in that character, unless it appear from the will that the testator intended him to hold it as trustee.² Where a person is both executor and trustee, the presumption is, after twenty years, that the estate is fully administered, and that the funds are held in trust.³ So, also, after a settlement of the estate.⁴

¹ *Phillipps v. Munnings*, 2 M. & Cr., 309; see also *ex parte Dover*, 5 Sim., 500.

² *State v. Nicols*, 10 Gill. & Johns., 27; see also *Perkins v. Moore*, 16 Alab., 9; *Newcomb v. Williams*, 9 Met., 525.

³ *Jennings v. Davis*, 5 Dana, 127.

⁴ *State v. Hearst*, 12 Miss., 365.

Mr. Hill, in his treatise¹ remarks, that "*in wills*, the intention of the testator is allowed much greater latitude in controlling and modifying the words than is admitted in the construction of *deeds*, and that, consequently, the decisions in cases of wills must be received very cautiously as authorities in cases of deeds.¹ But it appears that courts do not feel themselves strictly bound by the words of limitation in a deed, where they clearly do not express the intention of the donor or grantor, as gathered from the deed itself. Thus, it has been decided, that a limitation to the use of trustees and their heirs, may be restricted to an estate *per autre vie*, by a necessary implication arising from the object of the trust, coupled with the nature of the subsequent limitations.² And although Mr. Hill somewhat questions the authority of *Curtis v. Price*,² and cites the opinion of Mr. Butler in his notes, (Co. Litt. 290, 6, note 8) to the effect that where there is a limitation to one for life, with remainder to trustees and their heirs, for preserving contingent remainders, and the estate of the trustees is not restrained to the life of the tenant for life, they would certainly be considered as taking the whole fee; and also the opinion of Lord Eldon,³ in the case of Wyk-

¹ Hill on Trustees, 248; Co. Litt., 290, b., But. note 8; see also Colmore v. Tyndal, 2 Y. & J., 605; Dinsmore v. Biggert, 9 Barr, 135; Comby v. McMichael, 19 Alab., 751; Smith v. Thompson, 2 Swan., 389; Cruise Dig., tit. 38, ch. 9, sec. 1.

² Curtis v. Price, 12 Ves., 89, 100; Doe v. Hicks, 7 T. R., 433; see Chamberlain v. Thompson, 10 Conn., 244; Nicol v. Walworth, 4 Denio, 385; see also Doe d. Brune v. Martyn, 8 B. & Cr., 497.

³ 18 Ves., 423.

ham v. Wykham; and the authority of Colmore v. Tyndall,¹ yet he concludes, that the limitation in fee to trustees, contained in a deed, will not be restrained by implication, to a smaller estate, *unless* the intention of the instrument will not only not be answered, but will be defeated and contradicted by giving to such a limitation its full effect.² So that after all, though courts, where there is an express limitation of an estate *in fee*, contained in a deed, will not cut down the estate merely because a fee in the trustee is not necessary for the purposes of the instrument, yet where the intention can be clearly ascertained from the instrument itself to vest a lesser estate in the trustee, the court will not be absolutely confined to the *words* of limitation.

In the United States, it is generally held that the estate in the trustee may be enlarged by implication, when the purposes of the trust cannot be accomplished without. Thus, on a conveyance to trustees without words of inheritance, a fee will be implied if the purposes of the trust make it necessary.³ In many of the States these questions cannot well arise, because they have been settled by statute. Thus, in New York, an estate in fee may be created without words of inheritance. By the Revised Statutes,⁴ it is provided that every deed shall pass to the grantee all the estate of the grantor,

¹ 2 Y. & J., 605.

² Hill on Trustees, 251.

³ Fisher v. Fields, 10 Johns., 505; Welch v. Allen, 21 Wend., 147; see also 10 Mete., 32; 11 Mete., 84; 6 Cush., 403; 34 Maine, 537, and authorities cited in Wharton's note (1), Hill on Trustees, 251.

⁴ R. S., 1859, Vol. III., p. 38, sec. 1.

in the premises, unless an intent to create a lesser estate is either expressed or necessarily implied in the terms of such grant.¹ In Missouri² they have enacted the same provisions. So, likewise, in Georgia,³ Alabama⁴ and Arkansas,⁵ with merely this verbal variation, "every conveyance in which no other estate shall be expressly limited, shall be deemed a conveyance in fee simple." In Mississippi⁶ and Kentucky,⁷ it is provided that the fee shall pass unless a less estate be limited, either expressly or by construction and operation of law. So, likewise, in Virginia, the statute⁸ is in nearly the same words, and has been construed as intending to pass a fee without words of limitation.⁹ In Illinois words of perpetuity are still essential to pass the fee, whether by deed or devise.¹⁰ In New Jersey,¹¹ North Carolina and Tennessee, deeds stand as at common law; but in cases of wills, the estate may be enlarged or cut down, according to the apparent intent of the testator, as gathered from the language and purposes of the devise. In those States where there has been no express provision by statute, the principle stands as at common law.

¹ See preceding note.

² Rev. Stat., 1845, ch. 32, sec. 2.

³ Rev. Stat., 1845, p. 409, sec. 32.

⁴ Rev. Stat., 1823, tit. 18, ch. 5, sec. 5.

⁵ Rev. Stat., 1837, ch. 31, sec. 3.

⁶ Rev. Stat., 1840, ch. 34, sec. 23.

⁷ Rev. Stat., 1834, Vol. I., p. 443.

⁸ Tate's Dig., 174, sec. 27.

⁹ See 6 Rand, 73; 4 Leigh, 90; 8 Leigh, 449.

¹⁰ Jones v. Bramblet, 1 Scam. R., 276.

¹¹ Rev. Stat., 1847, p. 342.

As to estates in trust, however, it seems to be the law generally, in the United States, that where there are no words of limitation in a conveyance to a trustee, a fee will be implied whenever the purposes of the trust make it necessary. Thus, it has frequently been held, that a power to sell and convey will operate to enlarge the estate of trustees by deed, into a fee, where there are no words of limitation,¹ because the trustee cannot perform the duties required of him with a less estate.

There are also rules of construction by which an implied fee is raised in the devisee: As, *where the charge is on the estate*, and there are no words of limitation, the devisee takes only an estate for life.² But where the charge is on the *person of the devisee*, in respect to the estate in his hands, he takes a fee by implication.³ And where the charge is contingent, as to the real estate, the devisee takes only a life estate.⁴ And also where the limitation in the devise is clearly for life, it cannot be enlarged, by implication, into a fee.⁵

¹ Nelson v. Lagow, 12 How. U. S., 110; Cleveland v. Hallett, 6 Cush., 406; North v. Philbrook, 34 Maine, 537.

² Jackson v. Bull, 10 Johns., 148; Jackson v. Welles, 9 Johns., 222; Burlingame v. Belding, 22 Wend., 463; Messick v. New, 3 Seld., 163.

³ Jackson v. Bull, 10 Johns., 148; Jackson v. Martin, 18 Johns., 31; Spraker v. Van Alstyne, 18 Wend., 200; Fox v. Phillips, 20 Wend., 437; McLaughlan v. McLaughlan, 9 Paige, 534; Jackson v. Robins, 16 Johns., 537; Heard v. Horton, 1 Denio, 165; Harvey v. Olmsted, 1 Coms., 483; Vanderwerker v. Vanderwerker, 7 Barb., 221; Olmsted v. Olmsted, 4 Coms., 56; see Martin v. Ballou, 13 Barb., 119; Dummond v. Stringham, 26 Barb., 104; see Barheydt v. Barheydt, 20 Wend., 576.

⁴ Jackson v. Harris, 8 Johns., 141; Harvey v. Olmsted, 1 Coms., 483.

⁵ Tanner v. Livingston, 12 Wend., 83; Taytor v. Taytor, 4 Barb., 431; Jackson v. Robins, 16 Johns., 537.

Here it may not be deemed out of place to consider certain rules of construction, by which the *quantity of interest* intended to be conveyed, is determined. In most of the United States, under their statutes of conveyancing or passing estates, either by deed, grant, &c., or by devise, no technical words are necessary to pass a fee; if the intention of the grantor or testator can be gathered from the whole instrument. Thus, in New York, no technical words are necessary to devise a fee; and the intention of the testator, as gathered from the whole will, is to govern.¹ Thus, the word "estate," passes a fee.² So, also, the devise "of all one's right."³ So, also, where there is a devise without any words of limitation, but the duty to be performed, or the power to be executed by the devisee, requires that he should take the fee;⁴ or where there is a charge made upon the person of the devisee in respect to the estate devised.⁵ But where, by the language of the will, there is a clear and explicit devise of a life estate, it cannot be enlarged into a fee by implication, from merely charging the devisee with the payment of debts.⁶ So, also, where the devise con-

¹ Jackson v. Babcock, 12 Johns., 389; Jackson v. Housel, 17 Johns., 281; McLean v. McDonald, 2 Barb., 534; Doe v. Howland, 7 Cow., 277; see also Fox v. Phelps 17 Wend., 393; Newkirk v. Newkirk, 2 Cai., 345. As to provisions of 1 Rev. Stat., 748, sec. 1, see Campbell v. Rawdon, 19 Barb., 494.

² Jackson v. Merrill, 6 Johns., 185; Jackson v. Delancy, 13 Johns., 537.

³ Newkirk v. Newkirk, 2 Cai., 345.

⁴ Doe v. Howland, 7 Cow., 277; Fox v. Phelps, 20 Wend., 437.

⁵ Jackson v. Bull, 10 Johns., 148; Spraker v. Van Alstyne, 18 Wend., 200; Fox v. Phelps, 20 Wend., 437.

⁶ Tanner v. Livingston, 12 Wend., 83; Tator v. Tator, 4 Barb., 431.

tains no words of limitation or perpetuity, and there is no power to be executed or duty to be performed requiring a fee, the devisee takes only a life estate.¹

SECTION III. INCIDENTS TO THE ESTATE OF A TRUSTEE.

As the legal estate of the trust property is in the trustee, it becomes a question of importance to determine what are the incidents to and legal properties of the estate of trustees. It is now a well settled principle, *that the trustee only holds the legal estate for the benefit of the cestui que trust*; and that *it is not subject to incumbrances of the trustee*; neither to their specialty or judgment debts; nor to the dower of their widows, or the curtesy of their husbands;² neither is it to be affected by the bankruptcy or insolvency of the trustee.³ Where the trustee is attainted of felony, the legal estate is forfeited; but the one beneficially entitled has his relief in equity.³ Before the statute of 39 and 40, Geo. III, ch. 88, it was exceedingly questionable whether the trust could be enforced against the crown.⁴ But the act 4 and 5, Will. IV, ch. 23, effectually does away the

¹ Jackson v. Weltes, 9 Johns., 222; Jackson v. Embler, 14 Johns., 198; see Ferris v. Smith, 17 Johns., 221. For the rule in such cases, see Vanderwerker v. Vanderwerker, 7 Barb., 221.

² Cruise Dig., tit. 12, ch. 4, sec. 2; Copeman v. Gallant, 1 Pr. Wm., 314; Carpenter v. Marnell, 3 B. & P., 40; Beaver v. Filson, 8 Barr, 327; Loundsbury v. Purdy, 11 Barb., S. C., 490; Porter v. Bank of Rutland, 19 Vt., 410; Ludwig v. Highley, 5 Barr, 132; Hill on Trustees, 530, 269.

³ Cruise Dig., tit. 12, ch. 4, sec. 3.

⁴ See ante.

evil, by providing that real or personal property held in trust, shall not be the subject of forfeiture or escheat. Where the *cestui que trust* has been attainted, or dies without heirs, the trustee retains the estate for his own use.¹ The principle of these decisions is, that the legal estate being vested in the trustee, the land cannot escheat for want of a tenant. But this principle does not apply to personal estate; neither to leasehold estates.² In a recent case in England, where there was a devise in trust to convey to an alien, it was held that the Crown had no claim; nor could the trustee hold for his own benefit; but that there was a resulting trust for the heirs of the testator.³ So, also, where a trustee under a deed held freehold premises in trust for L. S., who was illegitimate, her heirs and assigns, for her and their own use and benefit. L. S., by her will, devised these premises to trustees, in trust, to sell, and out of the proceeds to pay debts and legacies, the legacies being specified in a paper marked A. L. S. died without issue. The paper marked A could not be found. The trustee of the deed offered to pay the debts, and claimed the trust premises for his own benefit. But the trustees of the will, however, filed a bill, and the Lord Chancellor decreed a conveyance to them, holding that the will gave them a title as against the trustees of the deed.⁴ In

¹ Hill on Trustees, 270; Att'y Gen. v. Sands, 1 Hale P. C., 249; Burgess v. Wheate, 1 Black., 123.

² Middleton v. Spicer, 1 Bro. C. C., 201; Walker v. Deane, 3 Ves., Jr., 170.

³ Rittson v. Stordy, 19 Jur., 771.

⁴ Onslow v. Wallis, 1 Mac. & Gor., 506; 1 Hall & T., 513; 13 Jur., 1085.

the case of *Middleton v. Spicer*, the testator had directed his leasehold estates to be sold, and bequeathed the money arising therefrom, to his executors in trust, after payment of debts and legacies, to pay the residue to charitable purposes, which could not take effect; and gave legacies to his executors. There being no next of kin, the executors filed a bill, claiming the residue for their own benefit. But Lord Thurlow held, that the executors, having legacies, and being clearly trustees, could not possibly take any beneficial interest. Consequently, there being no next of kin, he decreed in favor of the Crown.¹

In many of the States this subject is regulated by statute. In New York it is provided² that the people of the State, in their right of sovereignty, shall be deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State; and all lands, the title to which shall fail from a defect of heirs, shall revert or escheat to the people. And that all escheated lands, when held by the State, or its grantees, shall be subject to the same trusts, incumbrances, charges, rents, and services, to which they would have been subject had they descended; and the Supreme Court shall have power to direct the Attorney General to convey such lands to the parties equitably entitled

¹ 1 Bro. C. C., 201; *Barclay v. Russell*, 3 Ves., 424; *Taylor v. Haygarth*, 8 Jur., 132; 14 Sim., 8; *Powell v. Merrett*, 22 L. J. Ch., 408; *Darrah v. McNair*, 1 Ashm., 240; *Matthews v. Ward*, 10 G. & J., 443; 4 Kent's Com., 425; *Bishop v. Curtis*, 17 Jur., 23.

² R. S., 5th ed., 1859, Vol. III., tit. 1, sec. 1.

thereto, according to their respective rights, or to such new trustee as may be appointed by the court.¹ Mr. Kent, in his Commentaries, lays it down as a rule of law, that the State on taking lands by escheat, and even by forfeiture, takes the title which the party had and no other. That it is taken in the plight and extent by which he held it; and the estate of the remainderman is not destroyed or divested by the forfeiture of the particular estate.² In *Matthews v. Ward*³ it was held that equitable as well as legal estates were liable to escheat; and that upon the escheat of a trustee's estate, the State or its assignee, bore the same relation to the *cestui que trust* as the trustee did;⁴ and Mr. Greenleaf, in his note to Cruise,⁵ remarks, that on the whole, it is conceived that no State in the Union could now hold escheated lands discharged of the trust.⁴

The trustee, having the legal estate in the trust property, is entitled to the possession of the means by which that estate is to be maintained or defended. Upon this principle he is entitled to the possession of the title deeds of the property.⁵ So, also, where the trust property consists of personal estate, such as bonds, policies, and other securities for money, the trustee is entitled to their possession, provided

¹ R. S., 5th ed., 1859, Vol. III., tit. 1, sec. 2.

² 4 Kent's Com., 427; Foster's Crown Law, 95; *Borland v. Dean*, 4 Mason's Rep., 174; Dalrymple on Feudal Property, ch. 4, p. 145, 154.

³ 10 G. & J., 443.

⁴ Cruise Dig., tit. 12, ch. 4, sec. 4, note 1, (2d ed.)

⁵ Hill on Trustees, 272; *Strode v. Blackburn*, 3 Ves., 225; *Harrington v. Price*, 3 B. & Ad., 170; *Ivie v. Ivie*, 1 Atk., 431; *Ford v. Peering*, 1 Ves., Jr., 76; 8 Ves., 322, n.

it is a part of his duty to see that they are collected or realized, and he may enforce their delivery, even against the *cestui que trust*.¹ If the trustee have no active duties to perform in respect to the trust, the person who has the absolute beneficial interest therein will be entitled to the title deeds; because in such case the *cestui que trust* has a right to direct the conveyance of the estate.² So, also, where the personal possession or occupation of the property by the tenant for life, be necessary for its proper enjoyment, and it does not appear that the testator intended the trustee to have the personal management, as, in case of a family residence, the tenant for life may retain the title papers.³ So, also, where a tenant for life takes a legal estate of freehold, subject to a term vested in trustees for raising a charge, and the annual income be sufficient to satisfy the incumbrance, if the tenant for life secure the payment of the charge, he will be let into possession.⁴ But where the entire interest in the estate is vested in the trustee, with directions for the continued management of the property, or for the application of the income thereof to annual payments, or for the performance of any duties which require the personal management and control of the estate by the trustee, the court will be very reluctant to interfere.⁵ Where the object of the trust is to secure

¹ Jones v. Jones, 3 Bro. C. C., 80; also Pool v. Pass, 1 Beav., 600.

² Hill on Trustees, 273.

³ 5 Mad., 432.

⁴ Blake v. Bunbury, 1 Ves., Jr., 194, 514.

⁵ Tidd v. Lister, 5 Mad., 429; Naylor v. Arnitt, 1 R. & M., 501; Hill on Trustees, 384.

annuities, which are in arrears, the trustee should take possession of the estate, and give notice to the tenant to pay him the rents.¹

The legal estate being in the trustee, as a general rule, and as courts of law only recognize the legal owner, every action founded upon the legal title must be brought by the trustee or in his name.² In ejectment, the demise must be laid in the name of the trustee.³ So the grantee of a trustee may bring ejectment in his own name, even if the transfer was a breach of trust,⁴ because a court of law will not examine the equitable relation of the parties. In Pennsylvania, ejectment may be maintained either by the trustee or *cestui que trust*, when entitled to the possession, because, in that State, it is an equitable as well as legal action.⁵

Where the demise is laid in the name of the trustee, that which will show his legal title to the estate to be determined, will be a good defence. Thus, where the trust is terminated by operation of law;⁶ or where there is a presumption of reconveyance or surrender.⁷ As trespass is an injury to the possession, the trustee may sue for trespass upon real

¹ *Jenkins v. Milford*, 1 J. & W., 629.

² *Mordecai v. Parker*, 3 Dev., 425.

³ *Cox v. Walker*, 26 Maine, 504; *Goodtitle v. Jones*, 7 T. R., 47; *Beach v. Beach*, 14 Vt., 28; *Matthews v. Ward*, 10 G. & J., 443; *Wright v. Douglas*, 3 Barb. S. C., 559.

⁴ *Canoy v. Troutman*, 7 Ired., 155; *Reese v. Allen*, 5 Gilm., 241; *Taylor v. King*, 6 Mumf., 38.

⁵ *Hunt v. Crawford*, 3 Pa. R., 426; *Sch. Dr. v. Dunkleberger*, 6 Barr, 29; *Presb. Cong. v. Johnson*, 1 W. & S., 56.

⁶ *Nichol v. Walworth*, 4 Denio, 385.

⁷ *Obert v. Bordine*, 1 Spence, 394; *Hopkins v. Ward*, 6 Mumf., 38.

property, or the *cestui que trust*, according to the one who is in possession at the time of the injury.¹ For injuries by trespass to personal property, the legal title drawing to itself the possession, the trustee must sue.² So, likewise, in trover.³ In general, trustees, in actions at law, are subject to the same rules of pleadings as other parties. Thus, on contracts made with former trustees, suit must be brought in their names, as they were the original parties;⁴ so, also, must trustees sue jointly.⁵

In case of bankruptcy of the debtor to the trust estate, the trustee is the person to prove for the debt.⁶ So may he sign the bankrupt's certificate, for that follows the right to prove.⁷

Trust estates are subject to merge in the legal estate, where both estates come to the same person and are coextensive.⁸ In the case of *Wade v. Paget*,⁹ Lord Thurlow said it was universally true, that where legal and equitable estates unite, the equitable must merge in the legal.⁹ But Lord Alvanley, in the case of *Brydges v. Brydges*,¹⁰ said that if the doctrine of *merger* were maintained in *such* latitude, it would create infinite confusion; and that it must

¹ *Walker v. Fawcett*, 7 Ired. 44; *Cox v. Walker*, 26 Maine, 504.

² *McRaney v. Johnson*, 2 Flor. Rep., 520.

³ *Hower v. Geesaman*, 17 Ser. & Raw., 251; *Guphil v. Isbel*, 1 Bail., 230; *Hill on Trustees*, 274, see note.

⁴ *Ingersol v. Cooper*, 5 Blackf., 426; see 1 Spear, 242, and 5 Vern., 500.

⁵ *Brinkerhoff v. Wemple*, 1 Wend., 470.

⁶ *Ex parte Green*, 2 D. & Ch., 116; *ex parte Dickenson*, 2 D. & Ch., 520.

⁷ *Re Lawrence*, 1 M. & A., 453.

⁸ *Cruise Dig.*, tit. 12, ch. 2, sec. 34.

⁹ 1 Bro. C. C., 363.

¹⁰ 3 Ves., 126.

be understood with this restriction, that it holds only where the legal and equitable estates are coextensive and commensurate.¹

Merger is defined to be "the annihilation, by *act of law*, of the less in the greater of two *vested* estates, meeting, without any intervening estate, in the *same* person, in the *same* right; or if in *different* rights, meeting in the same person, *by act of the party*, and not by mere act of law; and so that the person in whom the estates thus meet in different rights by act of the party, shall have an absolute power of alienation over both estates.² Where the legal and equitable estates descend through different channels, and unite in the same person, and are equal and coextensive, and there is no beneficial interest which requires to be protected, or other just intention to be supported, the equitable estate will merge in the legal, both in law and in equity. In law the rule is absolute; but in equity it depends upon circumstances, as, the just and fair intention of the parties, or the purposes of justice.³

Mergers are not favored in equity, and are never allowed against the fair intention of the parties.⁴ Thus, where a person having a term of 1,000 years

¹ See preceding note.

² Cruise Dig., tit. 39, sec. 1; 3 Prest. Convey., 161, (3d ed.)

³ Greenleaf's note, Cruise Dig., tit. 39, sec. 1; 4 Kent's Com., 102; Simonton v. Gray, 34 Maine, 50; Campbell v. Carter, 14 Ill., 286; Knowles v. Lawton, 18 Geo., 476; Reed v. Latson, 15 Barb. S. C., 9; see also Mason v. Mason, 2 Sandf. Ch., 433; James v. Morey, 2 Cow., 246; James v. Johnson, 6 J. C. R., 417; Healey v. Alston, 25 Miss., 190.

⁴ 4 Kent's Com., 102; Donalds v. Plumb, 8 Conn., 453; Meech. Bank v. Edwards, 1 Barb., S. C., 272; Gardner v. Astor, 3 J. C. R., 53.

assigned it to the owner of the inheritance in trust, for his wife and children, and the beneficial interest in the term was afterwards assigned to the plaintiff, Lord Nottingham decreed that the plaintiff should hold the premises, notwithstanding the legal merger; and that the heir at law of the creator of the term, should make a farther assurance to him for the residue of the term.¹ In case of legal merger, equity will not permit the interest of the *cestui que trust* to be destroyed. Thus, where an estate for life, or for a term of years, is vested in a person upon trust, and the legal inheritance or any legal estate in immediate remainder, of equal or greater extent than the estate held in trust, is *subsequently* acquired by the trustee, the partial estate at law, will be merged. But equity will interfere and protect the interests of the *cestui que trust*; and, if necessary, will decree the possession to the *cestui que trust*, during the period of the estate so merged; or by directing the revival of the merged estate.² It is the lesser estate which is extinguished by *merger*; but the greater estate is not considered as enlarged by it; it continues after the merger, precisely of the same quality and extent of ownership as before.³ As a general rule, equal estates will not merge.³ The merger is produced either from the meeting of an estate of higher degree with an estate

¹ Saunders v. Bournford, Finch, 424; Hill on Trustees, 252.

² Hill on Trustees, 252; 1 Cruise Dig., tit. 8, ch. 2, sec. 47; Nurse v. Yerworth, 3 Sw., 608; Thom v. Newman, 3 Swanst., 603.

³ 4 Kent's Com., 99; 2 Bl. Com., 177; Preston on Conv., Vol. III., 7, 15, 18, 23.

of inferior degree, or from the meeting of the particular estate and the immediate reversion in the same person. Thus, an estate for years may merge in an estate in fee, or for life; and an estate *per autre vie*, may merge in an estate for one's own life; and an estate for years may merge in another estate or term for years, the remainder or reversion.¹ But where there is no incompatibility in the two estates subsisting in one and the same person at one and the same time, as making the same person his own landlord, or trustee for himself, no merger will take place.² Thus, a lease may be granted to a tenant *per autre vie*, to commence when his life estate ceases, for he will never, in that case, stand in the character which the law of merger is calculated to prevent, of the reversion to himself.

“With respect to *the duty of trustees* in relation to real property, it is still held, in conformity to the old law of uses, that *pernancy of the profits, executions of estates, and defence of the land, are the three great properties of the trust*. Therefore, a Court of Chancery will compel trustees, 1. To permit the *cestui que trust* to receive the rents and profits of the land; 2. To execute such conveyances as the *cestui que trust* shall direct; 3. To defend the title of the land in any court of law or equity.”³ The legal title to the estate being in the trustee, the *cestui que trust* having only an equitable interest therein, can-

¹ 4 Kent's Com., 100; Preston on Conveyance, 182, 183, 201; James v. Plant, 4 Adol. & Ellis, 749.

² 4 Kent's Com., *ut supra*.

³ Cruise Dig., tit. 12, ch. 4, sec. 5.

not convey the legal estate without the concurrence of the trustee. This concurrence he is entitled to, where he has the *absolute interest in the trust, and is competent in the eye of the law to direct the conveyance of the estate*. But the *cestui que trust* is only entitled to a conveyance where the whole *subject* of the trust belongs to him.¹ For if there are any charges on the land, as the payment of debts, legacies, annuities, &c., the legal estate cannot be taken from the trustee,² or where there are any contingent remainders to be supported, or any duty or trusts remain to be performed for the benefit of the remaindermen, if the continuance of the legal estate in the trustees be requisite for these purposes, the *cestui que trust* cannot compel a conveyance; for it would be a breach of trust for the trustees to divest themselves of the legal estate.³ As long as any of the original trusts remain to be performed the trustee cannot be required to divest himself of the legal estate.⁴ Where the *cestui que trust*, in whom the absolute beneficial interest of the trust property is vested, has disposed of his entire equitable estate to a purchaser, such purchaser may require a conveyance of the legal estate to him, without the concurrence of the *cestui que trust*.⁵ But if there be any doubt or uncertainty as to the validity of the title of the assignee of the equitable estate, the

¹ Ibid, sec. 6, 7, 8; Boteler v. Allington, 1 Bro. C. C., 73; Hill on Trustees, 278, and authorities.

² Cruise Dig., tit. 12, ch. 4, sec. 8; Carteret v. Carteret, 2 Pr. Wms., 134

³ Hill on Trustees, 279.

⁴ Carteret v. Carteret, 2 Pr. Wms., 134.

⁵ Goodson v. Ellison, 3 Russ., 583; Holford v. Phipps, 3 Beav., 434.

trustee may require the concurrence of the original *cestui que trust*, or the sanction of the court.¹ Whenever the trustee is called upon to divest himself of the legal estate in the trust property, and he has any doubts as to his duty in the premises, he has a right to refuse to act without the advice and sanction of the proper court, and whenever it appears that he acts in *good faith*, and under the advice of counsel, in refusing to convey, he will not be charged with costs.²

If the trustees have notice of any disposition or incumbrance of the equitable interest by the *cestui que trust*, they ought not to transfer the legal estate to him, or any subsequent purchaser from him; and if they do they will be liable to the party of whose rights or title they had notice.³

Where a *cestui que trust* has sold a portion only of his beneficial interest, or rather, has sold his beneficial interest in a portion only of the trust estate, he cannot compel the trustee to divest himself of the moiety thus disposed of. Lord Eldon said, in the case of *Goodson v. Ellison*,⁴ it was quite new to him to be informed that you can call on a trustee, from time to time, to divest himself of the different parcels of the trust estate so as to involve himself as a party to conveyances to twenty different persons. Has not a trustee a right to say, If you mean

¹ Hill on Trustees, 280, and 3 Russ., 583.

² Hill on Trustees, 279; *Knight v. Martin*, 1 R. & M., 70; *Angier v. Stannard*, 3 M. & K., 566; *Poole v. Pass*, 1 Beav., 600.

³ *Baldwin v. Billingsley*, 2 Vern., 539; see 2 Bro. C. C., 391; 3 Russ., 1.

⁴ 3 Russ., 594; see *Lyse v. Kingdom*, 1 Col., 184.

to divest me of my trust, divest me of it altogether, and then make your conveyances as you think proper?¹

It has already been remarked as a well settled rule, that the trustee only holds the legal estate for the benefit of the *cestui que trust*. There is, therefore, another rule in equity, that no act of the trustee shall prejudice the *cestui que trust*.² This rule, however, must be understood with this limitation. Where the trustee is in actual possession of the estate, and, for a valuable consideration conveys it to a purchaser, who has no notice of the trust, such purchaser will be entitled to hold the estate against the *cestui que trust*; because their equities are equal, and the court will leave the parties in the state in which it finds them when equities are thus balanced,³ and beside *equal equities*, the legal estate is in the purchaser. And should the purchaser afterward sell the estate to another party who knew of the trust, such second purchaser would hold the estate discharged of the trust,⁴ because the first purchaser, having a good title at law and in equity, must be permitted to dispose of it, if he please, which he could not do unless he could make a good title. But if the *trustee* at any time repurchases the estate, he

¹ See preceding note.

² Cruise Dig., tit. 12. ch. 4, sec. 9.

³ Ibid, sec. 10; Millard's Case, 2 Freem., 43; Finch v. Earl of W., 1 Pr. Wms., 278; see also Mead v. Lord Orrery, 3 Atk., 238; Earl Brook v. Bulkley, 2 Ves., 498; 2 Sugd. V. and P., 269; Pooley v. Budd, 14 Beav., 34.

⁴ Harrison v. Forth, Prec. Ch., 51; Lacy v. Wilson, 4 Mumf., 313; Mott v. Clarke, 9 Barr, 399; Fletcher v. Peck, 6 Cranch, 36; Bracken v. Miller, 4 W. & S., 102; Boynton v. Reese, 8 Pick., 329.

will again become liable to the trust.¹ Mortgagees are considered as purchasers; therefore if a trustee, in possession of the trust estate, mortgage the same to a person who has no notice of the trust, the mortgagee will hold as against the *cestui que trust*.² But if a trustee convey an estate to a stranger, without consideration, although the stranger have no notice of the trust, he will still be held liable, as a volunteer has no equity.³

As to the *time when* notice of the trust charges the conscience of the purchaser, it has been held that notice before actual payment of the money, although it be secured, and the conveyance be executed, is sufficient. It has further been held, that notice before the execution of the conveyance, even though the money had been paid, was sufficient to charge the purchaser,⁴ and the like rule has been generally adopted in the United States.⁵

¹ Cruise Dig., tit. 12, ch. 4, sec. 12; *Bovey v. Smith*, 1 Vern., 149.

² Cruise Dig., tit. 12, ch. 4, sec. 11, and 1 Pr. Wms., 278.

³ Salk., 680; 1 Vern., 149; *Hill on Trustees*, 165; *Tourville v. Naish*, 3 Pr. Wms., 307; *Story v. Lord Windsor*, 2 Atk., 630; *More v. Mayhew*, 1 Ch. Ca., 34.

⁴ *Wigg v. Wigg*, 1 Atk., 384.

⁵ For authorities on this point consult the note (2), page 247, of *Hill on Trustees*:

Note (2). The decisions in the United States as to the period before which notice must have been received in order to affect the purchaser, though not uniform, are in general in accordance with the English rule. *Wileox v. Callaway*, 1 Wash. Va., 38; *Snelgrove v. Snelgrove*, 4 Desau., 274; *Moor v. Clay*, 7 Alab., 742; *Blair v. Owles*, 1 Mumf., 40; *Simms v. Richardson*, 2 Litt., 274; *Williams v. Hollingsworth*, 1 Strob. Eq., 103; *Bush v. Bush*, 3 Strob. Eq., 131; *Alexander v. Pendleton*, 8 Cranch, 462; *Wormley v. Wormley*, 8 Wheat., 421; *Boon v. Chiles*, 10 Peters, 177; *Halsted v. Bank of Kentucky*, 4 J. J. Marsh, 554; *Pillow's Heirs v. Shannon's Heirs*, 3 Yerg., 508; notes to *Bassett v. Nosworthy*, 2 Lead. Ca. Eq., 2, 95,

As to *whom* the notice must be given, it may be either to the purchaser himself, his counsel, attorney or agent.¹ But the notice should be in the course of the same transaction or close upon it; for the purchaser is not to be supposed to carry in his recollection a notice given at some former period.² This notice of the trust may be actual or constructive. Where actual notice is given at or near the time of the transaction, there can be no question of the liability of the estate to answer the purposes of the trust, and therefore it demands no further attention. But where the notice is not actual, but must depend upon presumptions of more or less strength, there is more room for doubt and discus-

(1st ed.) But in *Youst v. Martin*, 3 S. & R., 430, *Boggs v. Varner*, 6 W. & S., 469, *Juvenal v. Jackson*, 14 Penn. St. R., 519, and in *Doswell v. Buchanan*, 3 Leigh, 365, by a majority of the court it was held that a purchaser would be protected by a payment of the purchase money, though before conveyance executed. And so again in Pennsylvania, contrary to the English doctrine, payment of a part of the purchase money will be protected *pro tanto*. *Youst v. Martin*, 3 S. & R., 430; *Bellas v. McCarty*, 10 Watts, 13; *Juvenal v. Patterson*, 16 Barr, 282; 14 Penn. St. Rep., 519; *Auer d. Flagg v. Mann*, 2 Sumn., 486; *Frost v. Beekman*, 1 J. C. R., 288. Actual payment is, moreover, usually decided to be necessary. *Murry v. Ballou*, 1 J. C. R., 566; *Jackson v. Cadwell*, 1 Cow., 622; *Christie v. Bishop*, 1 Barb. Ch., 105; *McBee v. Loftis*, 1 Strob. Eq., 90. But the notes of third persons, (*Jewett v. Palmer*, 7 J. Ch. R., 65,) or those of the vendee, if actually negotiated. (*Frost v. Beekman*, 1 J. C. R., 288, *Freeman v. Demming*, 3 Sandf. Ch., 327,) are equivalent to payment for this purpose. In Pennsylvania, valuable improvements before notice, (*Boggs v. Warner*, 1 W. & S., 469,) or payment of part and the rest secured to be paid on a contingency, (*Bellas v. McCarthy*, 10 Watts, 13). See also the discussion of this question, American notes, 2 Lead. Cas. Eq., 20, 32.

¹ Hill on Trustees, 165, and authorities; see also 4 Wheat, 466; 2 Sandf. Ch., 98; Mumf., 40; 19 Wend., 339; 4 W. & S., 108.

² 2 Sugd. V. & P., 276, (9th ed.); *Farnsworth v. Child*, 4 Mass., 640; *Hamilton v. Royce*, 2 Sch. & Lef., 315, 327.

sion. *Constructive notice* of the trust, is merely that degree of evidence of notice which raises so violent a presumption that the court will not permit it to be controverted.¹ Without investigating this question particularly in this place, it may be sufficient to say that there are certain acts and things of which all mankind are presumed to have notice. Such as public acts of the Parliament, or of the Legislature;² the pendency of a suit in respect to its subject matter; the registration of a deed under the recording acts, in force generally in the United States. But of these in another place.

Those circumstances which are sufficient to put a purchaser upon an inquiry, which would lead to a discovery of the trust, will be deemed a good *constructive notice* of it.³ Thus, it is to be presumed that every person who seeks to purchase real estate will be careful to ascertain the title he is to acquire. If the vendor is not in possession of the estate, this will be sufficient notice of an outstanding interest, the nature and extent of which the vendee is bound to ascertain; and if he purchases without inquiry, he does so at his peril.⁴ The legal estate of real property being in the trustee, he is presumed to be

¹ 2 Sugd. V. and P., 278, (9th ed.); *Rodgers v. Jones*, 8 N. H., 264; *Farnsworth v. Childs*, 4 Mass., 640; 1 Hoff. Ch., 156.

² 2 Sugd. V. and P., 280; 2 Ves., 480; 3 Bos. & Pul., 587.

³ 2 Sugd. V. and P., 290, (9th ed.); *Taylor v. Baker*, 1 Dan., 71; *Oliver v. Piatt*, 3 How. U. S., 333; *Barnes v. McClinton*, 3 Pa. R., 69; *Hood v. Fahnestock*, 1 Barr, 470; *Knouff v. Thompson*, 16 Pa. St. R., 357; *Sigourney v. Munn*, 7 Conn., 324; *Jackson v. Cadwell*, 1 Cow., 622.

⁴ *Flagg v. Mann*, 2 Sumn., 556; *Krider v. Lafferty*, 1 Whar., 303; *Kent v. Plummer*, 7 Greenl., 464.

entitled to the possession thereof. Therefore a purchase from a trustee who is not in actual possession at the time, cannot be supported as against the equities of the *cestui que trust*; for the possession of the *cestui que trust* is notice of the existence in him of some interest, the nature and extent of which the purchaser is bound to inquire into.¹ What will amount to sufficient proof of actual or constructive notice must be left mainly to the peculiar circumstances of each particular case, as it is impossible to lay down any general rule as to what will amount to sufficient proof. The court will not act upon mere suspicion. The Lord Chancellor, in the case of *Ware v. Lord Egmont*,² said: "Where a person has not actual notice he ought not to be treated as though he had notice, unless the circumstances are such as enable the court to say that, not only he might have acquired, but also that he ought to have acquired the notice with which it is sought to affect him, and which he would have acquired but for his own gross negligence in the conduct of the business in question. The question, where it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained knowledge, but whether the not obtaining it was an act of gross and culpable negligence."²

The question sometimes arises whether the trustee

¹ *Chesterman v. Gardner*, 5 J. C. R., 29; *Scroggins v. McDonald*, 8 Alab., 385; *Le Neve v. Le Neve*, 2 Lead. Ca. Eq. 150, and American notes; *Hardy v. Summers*, 10 G. & J., 316.

² 24 L. J. Ch., 366; 19 Jur., 97.

can be required to warrant the title to the vendee, and if so, to what extent. It is now well settled as a general rule that the trustee cannot be required to enter into any covenants of title beyond the usual one, that he has done no act to incumber the estate.¹ It has been laid down as a rule among conveyancers, that where lands are conveyed or devised to trustees upon a *trust to sell*, that the persons entitled to the money arising from such sale are bound to enter into the usual covenants with the purchaser, for the title, because they who were entitled to the beneficial interest in the lands were to be considered in equity as the real owners of it. In the case of *Lloyd v. Griffith*,² T. Lloyd devised certain estates to trustees, upon trust, out of the rents and profits thereof, or by selling or mortgaging the same, to raise such sum as should be sufficient to discharge a mortgage affecting an estate which the testator had settled by deed upon Mrs. Hester Webb, as also his just debts. The estates were sold for £27,000, and a draft of the deed of conveyance was prepared, to which Mrs. Webb was a party, and made to enter into the usual covenants. It was objected by the counsel of the grantors that Mrs. Webb was not bound to enter into any covenants for the title. But Mr. Booth,

¹ Cruise Dig., tit. 32, ch. 26, sec. 87; see also *Van Epps v. Schenectady*, 12 Johns., 436; *Sumner v. Williams*, 8 Mass., 162; *Dwinel v. Veazie*, 36 Maine, 509; 11 Ill., 24, and 5 Mumf., 295; *Worley v. Frampton*, 5 Hare, 560.

² 3 Atk., 264; Cruise Dig., tit. 32, ch. 26, sec. 85, 86; but see *Wakeman v. Duchess of Rutland*, 3 Ves., 223, 504; 8 Bro. Part. Ca., 145; *Att'y Gen. v. Morgan*, 2 Russ., 306.

who made the draft, insisted that it was the common practice where a person devised an estate to trustees, upon trusts, to sell, and pay over money to J. S., and the estate was sold by the trustees, to require J. S. to enter into the usual covenants for the title, because he held the real beneficial interest in the estate, and in equity was the owner. The counsel not being able to agree, the draft of the conveyance was referred to the master, who reported that Mrs. Webb was not bound to enter into covenants for the title. Exceptions were taken to the report, and Lord Hardwick made the following order: "Let the exceptions be allowed and let the master alter the draft of the conveyance by inserting therein proper covenants from Mrs. Webb, against her own acts, and the acts of Mr. Thomas Lloyd, her devisor, as to so much as she would be benefited by the estate."¹

It is contended, and very properly, that an executor might be compelled to enter into covenants so framed as not to render him or his heirs or executors liable for breaches of covenant, committed after he or they had assigned the term, *beyond the value of the personal estate* of the testator in his hands, not applicable to other debts having a priority, &c., thus placing him substantially in the same position as if the testator himself had entered into the covenant.²

As already stated, at common law the legal estate in the trustee had precisely the same properties and

¹ See preceding note.

² See Hill on Trustees, note (1), p. 281, 3d Amer. ed.; Jurist, Dec. 22, 1855, Vol. XIX., p. 500; Rawle's Cov. for Title, 419.

incidents as if the trustee had the entire beneficial interest therein. Thus, if a trustee marry, the wife at law, would be entitled to dower in the trust estate,¹ or if a female trustee marry, the husband at law, would be entitled to his curtesy.² But in equity, both the dowress and the tenant by the curtesy, are required to recognize the right of the *cestui que trust*. And, as the trust estate may be disposed of by the trustee in his lifetime, so, also, may it be by devise or bequest, at his death. But in all these cases the legal estate only passes, subject to the rights of the beneficiary. The trust estate may pass from the trustee, at death, either by the mere operation of law, as where it descends to his heirs or personal representatives, or by the act of the trustee, as by devise or bequest. But the same words in a will which will pass a legal estate, coupled with the beneficial interest, will not always pass the trust estate. In the case of passing the trust estate, it becomes necessary to take into consideration not only the words of the instrument, but also the attending circumstances, for the purpose of ascertaining the intention of the testator; for if he intend to pass the trust estate, that being ascertained, the intention will govern.

It has been seriously questioned whether a general devise of the testator's estate will pass those estates which he holds in trust.³ But in the case of Bray-

¹ Noel v. Jevon, Freem., 43.

² Bennet v. Davis, 2 P. Wms., 319.

³ Marlow v. Smith, 2 Pr. Wms., 198; Att'y Gen. v. Buller, 5 Ves., 340; Richardson v. Woodbury, 43 Maine, 206.

brook *v.* Inskip,¹ Lord Eldon declared, as the result of all the cases he had examined, the rule to be that, "where the will contained words large enough, and there was no expression authorizing a narrower construction, nor any such disposition of the estate as it was unlikely a testator would make of property not his own, the trust estate would pass."¹ But where the directions in the will required such a disposition of the estate as would not be consistent with fidelity on the part of the trustee, such directions would be deemed a sufficient indication that the testator did not intend to pass a mere trust estate, upon the principle that a breach of trust will not be presumed. Thus, where the testator charges the estate with the payment of debts, legacies, annuities, &c., or where he requires the estate to be sold, &c.,² or gives any direction as to the disposition of the estate, which implies that he intended to dispose of the beneficial interest as well as the legal estate, it will be deemed sufficient to exclude trust estates from the operation of the will.³ This principle has likewise been observed in very many instances in the United States.⁴ Indeed, it seems

¹ 8 Ves., 417, 436; see also *ex parte* Morgan, 10 Ves., 101; *Roe v. Reade*, 8 T. R., 118; *Hawkins v. Obeen*, 2 Ves., 559; *Richardson v. Woodbury*, 43 Maine, 206.

² *Braybrook v. Inskip*, 8 Ves., 436; see also *Duke of Leeds v. Munday*, 3 Ves. 348; *Att'y Gen. v. Vigor*, 8 Ves. 273; *Thompson v. Grant*, 4 Mad. 438.

³ *Langford v. Auger*, 4 Hare, 313; *Sylvester v. Jarman*, 10 Price, 78; *Rackham v. Siddall*, 16 Sim., 297; *Hope v. Liddle*, 21 Beav., 183; *Lindsell v. Thacker*, 12 Sim., 178; *Cruise Dig.*, tit. 38, ch. 10, sec. 140.

⁴ See *Merritt v. Farmers' Fire Ins. and Loan Co.*, 2 Edw. Ch., 517; *Heath v. Knapp*, 4 Barr, 228; *Ballard v. Carter*, 5 Pick., 112; *Jackson v. De Laney*, 13 Johns. R., 537.

necessarily to follow from considering the legal estate to be in the trustee.

The conflict of authorities upon the question whether a *general devise* will pass the estates which the testator holds in trust, without some particular words or purposes designating such intention, arises upon the *presumption* which is to govern. The rule at first was, that a *general devise* would pass the trust estate, that is, a mere passive or dry trust.¹ The propriety of this rule was afterwards doubted, and it was at length determined that a *general devise would not be sufficient*, unless there appeared a positive intention that the trust estate should pass.²

It is remarked in a note, page 259, vol. 97, Law Library, Lewin on the Law of Trusts and Trustees, that the doubt whether a *general devise* would pass the estates which the testator held in trust, arose in part from an expression of Lord Hardwick, in *Casborne v. Scarfe*, above cited, "that by a devise of all lands, tenements and hereditaments, a mortgage in fee would not pass, unless the equity of redemption were foreclosed." But, it is added, "Lord Hardwick was not speaking here of the *legal* estate, but of the *beneficial* interest in the mortgage." Whatever might have given rise to the doubt, it seemed to be considered the law until in the case of *Lord Braybrook v. Inskip*,³ Lord Eldon laid down

¹ 2 Pr. Wms., 198; *Sir Thomas Littleton's Case*, 2 Ventr., 351; *ex parte Sergison*, 4 Ves., 147.

² *Att'y Gen. v. Buller*, 5 Ves., 339; *Casborne v. Scarfe*, 1 Atk., 605, and Mr. Sanders' note thereto; *Pickering v. Vowles*, 1 B. C. C., 198; *Strode v. Russell*, 2 Vern., 625; *ex parte Brettell*, 6 Ves., 577, and 8 Ves., 437.

³ 8 Ves., 417, 432.

the contrary rule, that is, that a *general devise* would pass trust estates, where the will contained words large enough, and there was no expression requiring a narrower construction, or any disposition of the estate a testator would be unlikely to make of property not his own. This latter rule of Lord Eldon has generally been followed since, especially in cases of mere *dry trust* estates.¹ There has been, and still is, some question as to the power of the trustee, where he is charged with the performance of active duties, to dispose of the trust estate by will. It is a well settled principle, that where the trust is a matter of confidence reposed in the trustee, accompanied with discretionary powers and duties of management, they cannot be delegated by him to another, unless the instrument creating the trust confer such power upon him.² Therefore, if a trustee, in whom confidence is reposed by committing to him the active management of the trust, should, without special authority contained in the instrument creating the trust, devise the estate, the legal title might pass to the devisee; but he would not be authorized to undertake the management of the trust.³ In the case of *Cook v. Crawford*,⁴ where there was a limitation to the surviving trustee and his heirs, omitting the word *assigns*, it was held not to authorize a devise of the trust estate. And

¹ Cruise Dig., tit. 38, ch. 10, sec. 140; Hill on Trustees, 283, note (1), American authorities.

² *Wilkinson v. Parry*, 4 Russ., 272; *Chalmers v. Bradley*, 1 J. & W., 68.

³ *Mortimer v. Ireland*, 11 Jur., 721; 6 Hare, 196; *Cook v. Crawford*, 13 Sim., 91; *Lord Braybrook v. Inskip*, 8 Ves., 417, 432.

⁴ 13 Sim., 91.

although this decision has been questioned, in more recent discussions in England,¹ the point has not been overruled; and it would be deemed unsafe for a trustee to attempt to devise a trust reposed in him, or for a devisee of such trust to attempt to exercise it.

In the case of *Cook v. Crawford*, the Vice Chancellor expressed a strong opinion against the propriety of the trustee's devising his estate, upon general principles, saying that he saw no substantial distinction between a delegation of the trust by an act *inter vivos*, and by devise, for the latter was nothing but a *post mortem* conveyance. But Lord Langdale, in the case of *Fitley v. Wolstenholme*,² expressed strongly his disapprobation of the doctrine. He thought there was a wide distinction between a conveyance operating in the *lifetime* of the trustee, and one only taking effect at the *time of his death*; for the personal discretion was confided to him during his life, which he could not delegate; but the settlor could not have reposed any personal confidence in his heir, not knowing beforehand who he might be; and beside, if the estate were allowed to descend it might become vested in married women, infants or bankrupts, or persons out of the jurisdiction, and therefore he could not hold it to be a breach of trust to transmit the estate by will to a trustworthy devisee,² and this doctrine of Lord Langdale was sustained in the case of *Beasley v. Wil-*

¹ See 9 Jur., pt. 2, p. 129, 181; 7 Beav., 425.

² 7 Beav., 435.

kinson,¹ where a sole surviving trustee devised all estates which might be vested in him at his decease as trustee, and which he could devise without breach of trust, upon the trusts affecting the same respectively; and it was held that the estate vested in the devisee.¹ Such a devise undoubtedly would vest in the devisee all such trust estates as would not involve a *breach of trust*. But the question would still arise, by what rule shall such estates as will not pass under that designation, be determined.

There are trust estates which would not pass under such a description; such as vest in the trustee trusts and powers purely discretionary; or such as are strictly matters of personal confidence.² But in other cases, and especially where the estate is vested in the trustee, his executors, administrators and assigns, in trust, for the purposes designated, without any provision in the instrument for appointing other trustees, it would not be deemed a breach of trust for the trustee to devise the estate to a trustworthy devisee.³ But there are cases where the word *assigns* will not be construed to mean the devisee, as where the settlement should contain a power of appointing a new trustee.⁴

It would seem from an examination of the cases,

¹ 13 Jur., 649.

² *Mortimer v. Ireland*, 11 Jur., 721.

³ *Braybrook v. Inskip*, 8 Ves., 417, 434; *Titley v. Wolstenholme*, 7 Beav., 436; *Lane v. Debenham*, 17 Jur., 1005; *Saloway v. Strawbridge*, 1 Kay & Johns., 371; *McDonald v. Walker*, 14 Beav., 556; but see *Wilson v. Bennett*, 5 DeGr. & Sim., 98.

⁴ *Fordyce v. Willis*, 2 Phil., 497; see also *Wilson v. Bennett*, *ut supra*; *Re Burt's Estate*, 1 Drew, 319.

that no definite rule has yet been fixed upon by the court, by which to determine, in doubtful cases, where the trust will, and where it will not, pass to the devisee; and that the propriety or impropriety of such devises must depend upon the circumstances of each particular case. Where the intention of the settlor will permit it, and it is certain that the heir apparent or presumptive will be an infant, a bankrupt, an insolvent, a lunatic, a *feme covert*, or out of the jurisdiction, it will not only be proper, but it will be the duty of the trustee to transmit the estate by devise, to a trustworthy devisee.¹ The question whether the legal estate of a mortgage in fee passes by devise, depends often upon other considerations. In some States, the legal estate is in the mortgagor until forfeited by non-payment, or the non-fulfilment of the conditions; and the mortgagee has only a beneficial interest as security.² These questions in such States, must be determined by ascertaining in each particular case, the nature of the testator's estate in the mortgaged premises. In determining the effect of a general devise, it is usual to treat estates vested in the testator as trustee and mortgagee alike, for upon the execution of the conveyance by which a mortgage is created, the legal estate of freehold and inheritance, or the legal estate of the term of years created by the mortgage, becomes immediately vested in the mortgagee.³ But nevertheless there is a distinction

¹ Lewin on Trusts, &c., 268.

² *Ragland v. The Justices*, 10 Geo., 65; also in Ohio.

³ Cruise Dig., tit. 15, ch. 2, sec. 1; 4 Kent's Com., 155.

between the two classes of cases which should not be lost sight of. The mortgagee has a beneficial interest in the estate, as a security; and this is strongly in favor of the legal estate passing to the person who is to receive the mortgage money,¹ and, beside, the mortgagee often stands in the relation of vendor to the purchaser, who, before the completion of the conveyance, is a trustee for the vendee; and the estate will pass by a general devise where it would not have been included had the testator been an express trustee. Said Sir T. Plummer, in the case of *Wall v. Bright*,² “For many purposes a *constructive trustee* stands in a different situation from a *naked trustee*. A mere trustee is a person who not only has no beneficial ownership in the property, but never had any, and could therefore never have contemplated a disposition of it for his own purposes. A vendor was at one time both the legal and beneficial owner, and may again become so if anything should happen to prevent the execution of the contract. It may turn out the title is not good, or the purchaser may be unable to pay, or may become a bankrupt. The purchaser is not entitled to the possession unless stipulated for, and if the purchase money has not been paid, a court of equity would restrain him at the instance of the vendor.” And upon these grounds his honor held that an estate which was the subject of a contract was included in a general devise to trustees, though

¹ Lewin on Trusts, 264; *Doe v. Bennett*, 6 Exch., 892; *King's Mortgage*, 5 DeGr. & Sim., 644; 5 Sim., 451; 6 Sim., 115; 9 Hare, 414.

² 1 J. & W., 494.

upon trusts to sell.¹ Mr. Cruise, in his Digest,² lays down the rule to be, that mortgages, prior to foreclosure, being considered personal engagements only, in which money borrowed is the principal, and the conveyance of the land only accessory, it is established that neither the general words, *lands, tenements* and *hereditaments*, nor any other words particularly appropriate to the description of real estate, will carry the mortgage in fee, if the testator—the mortgagee—has other property to satisfy the words.³

It may be laid down as a rule, that where there is a general devise of real estate for purposes applicable only to the testator's absolute property, and inconsistent with the beneficial title of another person, it will be held not to operate upon mere trust estates.³ But a *general power of disposal given* to the devisee will not alter the rule.⁴

And the extent to which a devisee of the trust estate can execute the trusts of the will, must depend upon the intention of the settlor, as gathered therefrom.

In New York it is provided by statute,⁵ that, "upon the death of the surviving trustee of an

¹ Lewin on Trusts, 268, and *Wall v. Bright*, *ut supra*; but see *Strode v. Russell*, 2 Vern., 625; *Pickering v. Vowles*, 1 Bro. C. C., 198.

² Tit. 38, ch. 10, sec. 135; see also *Cogdell v. Cogdell*, 3 Desau., 364; *Pickering v. Vowles*, 1 Bro. C. C., 198; *Strode v. Russell*, 2 Vern., 625; *Winn v. Littleton*, 1 Vern., 4; *Rackham v. Siddall*, 16 Sim., 297; *Duke of Leeds v. Munday*, 3 Ves., 348.

³ Hill on Trustees, 285, and note; 4 Barr, 228; *Lindsell v. Thacker*, 12 Sim., 178.

⁴ *Heath v. Knapp*, 4 Barr, 228; Lewin on Trusts. &c., 264; *Braybrook v. Inskip*, 8 Ves., 425; *ex parte Shaw*, 8 Sim., 159.

⁵ R. S., Vol. III., p. 22, sec. 87.

express trust, the trust estate shall not descend to his heirs, nor pass to his personal representatives; but the trust, if then unexecuted, shall vest in the Supreme Court, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose under the direction of the court." There are, also, similar provisions in Michigan,¹ and Wisconsin.² In Pennsylvania, trust estates of the realty descend to the heir at common law, and not to the heirs by statute.³

¹ R. S., 1846, ch. 90, sec. 24.

² R. S., 1858, ch. 84, sec. 24.

³ 1 Binn., 91.

CHAPTER VIII.

COMPENSATION OF TRUSTEES.

It was said by Lord Chancellor Talbot, in the case of *Robinson v. Pelt*,¹ “that it was an established rule that a trustee, executor, or administrator shall have no allowance for his care and trouble, for that, on these pretences if allowed, the trust estate might be loaded and rendered of little value.” This rule is based upon the well-established principle, almost universally acted upon by Courts of Equity, “*that a trustee shall not profit by his trust.*”

Where a testator had directed certain businesses to be carried on by his trustees and executors, and directed several onerous trusts to be performed by his trustees, but had given no legacies or reward for their trouble; upon a petition being presented by one of them to ascertain what would be proper to be allowed to him as a compensation or recompense for his loss of time, personal trouble and expense in the management and settlement of the testator's affairs, Sir John Leach, V. C., said: “The trustee is, of course, entitled to all reasonable expenses which he may have incurred in the con-

¹ *Robinson v. Pelt*, 3 P. Wms., 132. As for the reasons for this rule, see *Moore v. Frowde*, 3 My. & Cr., 50, per Lord Cottenham.

duct of the trust, and requires no order for that purpose ; but the general rule must be applied to him, *that a trustee is not entitled to compensation for personal trouble and loss of time.*"¹

Lord Hardwick declared, "that in general, this court looks upon trusts as *honorary, and a burden upon the honor and conscience of the person entrusted, and not undertaken upon mercenary views.*"²

In the case of *Greene v. Winter*,³ Mr. Chancellor Kent declared, "that even were he free from the weight of English authority, he would greatly hesitate before he undertook to question the wisdom of this rule." And again he added, "nor does the rule strike me as so very unjust or singular and extraordinary ; for the acceptance of every trust is voluntary and confidential, and a thousand duties are required of individuals, in relation to the concerns of others, and particularly in respect to numerous institutions, partly of a private and partly of a public nature, in which a just indemnity is all that is expected or granted. I should think it could not have a very favorable influence on the prudence or diligence of a trustee, were we to promote, by hopes of reward, a competition, or even a desire for the possession of private trusts, that relate to the monied concerns of the helpless and infirm."⁴

But, although such is the English rule at common

¹ *Brooksopp v. Barns*, 5 Madd., 90.

² *Ayliffe v. Murray*, 2 Atk., 58.

³ 1 Johns. Ch., 37.

⁴ *Manning v. Manning*, 1 Johns. Ch., 534.

law, and was very early recognized in some of the States, the rule now acted upon in the United States is quite different. "Although, as a general principle of equity, no rule can be more salutary, and none is more universally recognized than that *a trustee shall not profit by his trust*, yet when carried to the extent of denying a reasonable compensation for his services, it can scarcely be said to have at the present day any application in this country. The state of our country, and the habits of our people are so different, as to induce the Legislatures of nearly all the States to introduce provisions by statute for competent remuneration to those to whom the law commits the care and charge of the estate of infants and deceased persons, and the courts make a reasonable allowance to receivers appointed by them, besides reimbursing their expenses. And the equity of the statute is, by construction, generally extended to conventional trustees when the agreement is silent."¹

Mr. Justice Story, remarking upon the reasons assigned for not allowing trustees, &c., any compensation for their personal services as trustees, adds, "to say that no one is obliged to take upon himself the duty of a trustee, is to evade and not to answer the objection. The policy of the law ought to be such as to induce honorable men, without sacrifice of their private interest, to accept the office, and to take away the temptation to abuse the trust for mere selfish purposes, as the only in-

¹ 2 Lead. Cas. in Eq., 228; *Boyd v. Hawkins*, 2 Dev. Eq. Rep., 334.

demnity for services of an important and anxious character."¹

Under the English rule, any one standing in a fiduciary relation will not be allowed to derive any profit beyond the salary of his office, and it has been extended to the chairman or director of a railway company.² The rule is, also, applicable to an executor carrying on the business of his deceased partner.³ Neither will an executor or trustee be permitted to make a profit out of his trust by his professional business ; as a factor acting as executor, is not entitled to a commission,⁴ nor can an attorney or solicitor charge his *cestui que trust* but for expenses and costs out of pocket,⁵ nor can his partner.⁶ But where a solicitor is a trustee, and as trustee is a defendant, and is held to be entitled to his costs, the court will direct them to be taxed as between solicitor and client.⁷ But where a mortgagee had acted as his own solicitor, in a suit in defence of his own title, the Vice Chancellor, Sir R. T. Kin-

¹ Story's Eq. Jur., sec. 1268; *Barney v. Saunders*, 16 How. U. S. Rep., 542; *Shirley v. Shattuck*, 6 Cush., 26.

² *York and North Midland R. R. Co. v. Hudson*, 16 Beav., 485.

³ *Burden v. Burden*, 1 V. & B., 170; *Stocken v. Dawson*, 6 Beav., 371.

⁴ *Scattergood v. Harrison*, Mos., 128; *Sheriff v. Axe*, 4 Russ., 33. But the court can, in its discretion, appoint an executor or trustee a consignee, with the usual profits. *Marshall v. Holloway*, 2 Sw., 432; and see *Morrison v. Morrison*, 4 My. & Cr., 215, 224.

⁵ *New v. Jones*, 1 Hall & T., 632; *Bainbridge v. Blair*, 8 Beav., 588; *Todd v. Wilson*, 9 Beav., 486; *Gomley v. Wood*, 3 J. & L., 702; *Lyon v. Baker*, 5 DeG. & Sm., 622; see also *Lincoln v. Windsor*, 9 Hare. and Broughton v. Broughton, 2 Sm. & Giff., 422; 5 DeG., Mac. & G., 160.

⁶ *Collins v. Carey*, 2 Beav., 129; *Christophers v. White*, 10 Beav., 523; *Lyon v. Baker*, 5 DeG. & Sm., 622.

⁷ *York v. Brown*, 1 Coll., 260.

dersley, refused to allow him, as against a second mortgage, any other than costs out of pocket.¹

An executor appointed in the East Indies, in passing his accounts in a Court of Equity in England, is entitled to a commission of five per cent., upon the receipts of payments, according to the practice in the East Indies. Lord Rosslyn, in allowing the commission, observed "that the appointment of an executor in India, no legacy being given to him, was the appointment of an agent for the management of the estate; that there could be no possibility of getting the business done at all without the allowance; and if the executors in England were to get a person to do the business in India, they could not get it done so cheap."² But where the testator has given to the executor in India a legacy for his trouble, he will not be entitled to his commission unless he renounce the legacy, nor will he be permitted to do that after a long lapse of time.³

So, also, trustees and guardians managing the estates of West India proprietors, are entitled to a commission of six per cent., as long as they personally take care of the management and improvement of the estates committed to their charge; but not if they leave the island and trust the management to others acting as their attorneys.⁴

¹ *Selatter v. Cottam*, 3 Jur., N. S., 630.

² *Chetham v. Lord Audley*, 4 Ves., 72; see *Matthew v. Bagshawe*, 14 Beav., 123.

³ *Freeman v. Fairlee*, 3 Mer., 24.

⁴ *Chambers v. Goldwin*, 5 Ves., 834; 9 Ves., 254, 273; *Denton v. Davy*, 1 Moor Par. C. C., 15, and *Henckell v. Daly*, ib., 51; *Forrest v. Elwes*, 2 Mer., 68; see Jamaica Act, 24 Geo. II., ch. 10, sec. 8.

And, although trustees and executors will not, in the absence of contract, or other provision made by the creator of the trust, be allowed any remuneration for their trouble and loss of time, they may, in special cases, employ agents whose expenses will be allowed out of the estate. Thus, a trustee may, in a proper case, employ a bailiff to manage an estate and receive the rents.¹ So, although a solicitor, he may employ another solicitor to do his business for him in the management of the testator's affairs;² or an accountant may also be employed, if the accounts are of a difficult nature or very complicated,³ or an agent may be employed to collect debts on a commission.⁴ But the propriety of such employments, and the amount of compensation to be paid, are peculiarly within the sound discretion of the court; and they will be allowed in the accounts or not, as equity shall seem to require.⁵

But the creator of the trust may direct, generally, that a compensation shall be paid to the trustee for

¹ *Bonithon v. Hickmore*, 1 Vern., 316; *Stewart v. Hoare*, 2 Bro. C. C., 663; *Wilkinson v. Wilkinson*, 2 S. & St., 237; *McWhorter v. Benson*, Hopk., 28; *Cairns v. Chaubert*, 9 Paige, 164; *Collins v. Hoxie*, 9 Paige, 37; *Jewett v. Woodward*, 1 Ed. Ch., 200; but see also *Meacham v. Sterns*, 9 Paige, 407.

² *Macnaumara v. Jones*, 2 Dick., 587; *Stanes v. Parker*, 9 Beav., 389; *McWhorter v. Benson*, Hopk., 28; *Cairns v. Chaubert*, 9 Paige, 164; *Halsey v. Van Amringe*, 6 Paige, 12; *Burtis v. Dodge*, 1 Barb. Ch., 91.

³ *Henderson v. Melver*, 3 Madd., 275; *New v. Jones*, 1 Hall & T., 634.

⁴ *Weiss v. Dill*, 3 My. & K., 26.

⁵ See *Weiss v. Dill*, 3 My. & K., 26, and the remarks of Sir John Leach, M. R.; and see *Hopkinson v. Roe*, 1 Beav., 180; *Day v. Croft*, 2 Beav., 488; *ex parte Cassel and Spayde*, 3 Watts, 443; *Swartswalter's Accounts*, 4 Watts, 79.

his care and trouble ; and if he does not fix the amount, a reference will be directed to settle what will be a reasonable and just allowance ;¹ or he may fix the compensation at a particular sum, or by a salary.²

So, also, a trustee or executor may contract with a *cestui que trust* to receive some compensation for acting, or to make professional charges for acting. But such contracts will be most carefully watched by the court, and, unless perfectly fair, and obtained without any undue pressure upon the *cestui que trust*, will not be enforced.³ In the case of *Ayliffe v. Murray*, the executors and trustees refused to prove the will, or act in the trust, or permit the *cestuis que trust* to take out letters *cum testamento annexo*, until he had executed a deed by which he was to pay to one of the executors, who was a solicitor and drew the will, £100, and to the other £200, over and above their legacies. A bill was brought for a specific performance, and for an account. But Lord Hardwick declared that the deed was unduly obtained, and decreed that no allowance should be made for the sums of £100 and £200. His Lordship admitted that a contract for an extra allowance might be made on the part of a trustee with a *cestui que trust*, which the court would sanction ; but at

¹ *Ellison v. Airey*, 1 Ves., 115; *Willis v. Kibble*, 1 Beav., 559; *Jackson v. Hamilton*, 3 J. & L., 702; and see *Bainbridge v. Blair*, 8 Beav., 597.

² *Webb v. Earl of Shaftesbury*, 7 Ves., 480, and *Baker v. Martin*, 8 Sim., 25.

³ *Ayliffe v. Murray*, 2 Atk., 58; see also *re Wynch*, 11 Beav., 209, and *re Sherwood*, 3 Beav., 338; see also *Gould v. Fleetwood*, Mich., 1732; 3 P. Wms., 251, n. (A.), and 2 Eq. Ca. Abr., 453, pl. 8.

the same time it would be watched with great jealousy, and the court would be extremely cautious and wary in doing it.¹

So, also, a trustee may contract with the court that he will not undertake the trust without proper compensation; and if he has undertaken the trust upon an understanding that application should be made to the court for compensation, a reference will be made to a master to ascertain and settle what would be a reasonable allowance both for past and future services in the trust.²

The rules regulating the compensation of those acting in a fiduciary capacity, in the several States, vary in so many particulars that a systematic classification of them would be very difficult. It may be laid down, however, as a universal rule, that compensation for labor and services rendered as trustee, executor, etc., is deemed to be reasonable and just; and where no special statute exists authorizing or requiring it to be given, Courts of Equity, in their just discretion, make what they deem to be a reasonable allowance.³

In Pennsylvania there was an act passed in 1713 which authorized the Orphan's Courts to order the payment, by executors, of such reasonable fees for copies, and "all other charges, trouble and attend-

¹ See preceding note.

² *Marshall v. Holloway*, 2 Swans., 432; *Brocksopp v. Barnes*, 5 Madd., 90; *Morrison v. Morrison*, 4 My. & Cr., 215.

³ In Pennsylvania, *ex parte Cassel v. Spayd*, 3 Watts, 443; *Swartswalter's Account*, 4 Watts, 79; *Wilson v. Wilson*, 3 Binn., 560; *Anderson v. Neff*, 11 S. & R., 218; see remarks of Tilghman, C. J., in *Pusey v. Clemson*, 9 S. & R., 209.

ance, which any officer or other person should necessarily be put to," as the court should deem just; and compensation to trustees, guardians, &c., seems to have been sanctioned by practice, upon an equitable construction of this statute.¹ But by the Revised Statutes of 14th June, 1836, it is provided, "that it shall be lawful for the court, whenever compensation shall not have been otherwise provided, to allow such compensation to assignees, trustees, &c., out of the effects in their hands, for their services, as shall be reasonable and just."

In New York, by the act of 1817, it was made lawful for the Court of Chancery, in the settlement of accounts of guardians, executors, and administrators, to make them a reasonable allowance for their services as such, over and above their expenses.² Under this statute an order in chancery was made, directing that the allowance for receiving and paying money should be five per cent. on all sums not exceeding one thousand dollars; two and one-half per cent. on any excess between one thousand and five thousand, and one per cent. for all above that amount.³ This rule has been adopted in the Revised Statutes,⁴ which provide further that in all cases such allowance shall be made for their *actual* and *necessary expenses* as shall appear just and reasonable; and that where any provision shall be made

¹ *Prevost v. Gratz*, 3 Wash. C. C. Rep., 434; *Hackert's Appeal*, 12 Harris, 486.

² See *Matter of Roberts*, 3 Johns. Ch., 43; see Laws 1817, p. 292.

³ 3 Johns. Ch., 630.

⁴ 2 R. S., 93, sec. 58, clauses 1, 2, 3, and see also 3 R. S. 1859, p. 180.

by any will for specific compensation to an executor, the same shall be deemed a full satisfaction for his services, in lieu of the allowance aforesaid, or his share thereof, unless such executor shall, by a written instrument to be filed with the surrogate, renounce all claim to such specific legacy,"¹ and by equitable construction these provisions have been extended to committees of lunatics, idiots, etc.;² and also to trustees under any express trust, where the trust instrument was silent; and that the trustee, upon the settlement of his accounts, will be allowed the same fixed compensation for his services by way of commissions, as are allowed by law to executors and guardians, to be computed in the same manner.³ It is held that the discretion of the court in these cases is confined to the *manner* of compensation, and that it cannot sanction any specific charge or per diem allowance.⁴

The language of the statute is, "they shall be allowed for receiving and paying out," but it does not specify how much is to be allowed for *receiving*, and how much for *paying out*; and, it sometimes happening that the one *receiving* was not the one *paying out* the fund, it became necessary for the

¹ 2 R. S., p. 93, sec. 59. As to the construction of these provisions, see *Dakin v. Denning*, 6 Paige, 95; *Stevenson v. Maxwell*, 2 Sand. Ch., 284.

² *Roberts' Case*, 3 Johns. Ch., 43; *Meacham v. Sterns*, 9 Paige, 403; *Livingston's Case*, 9 Paige, 442; *De Peyster's Case*, 4 Sand. Ch., 514; see also remarks of Davies, J., in *Wagstaffe v. Lowerre*, 23 Barb., 224, on the subject of commissions on lands, &c.

³ *Meacham v. Sterns*, 9 Paige, 403; *Wagstaffe v. Lowerre*, 23 Barb., 224.

⁴ *McWhorter v. Benson*, Hopk., 28; *Vanderheyden v. Vanderheyden*, 2 Paige, 288; *Valentine v. Valentine*, 3 Barb. Ch., 438.

court to construe the statute and settle the rule in such cases. The rule in general, is settled to be, to allow one-half the commission for *receiving* and one-half for *paying out*.¹

In Kellogg's case,¹ the guardian had been allowed commissions for receiving and paying out the amount of the legacy bequeathed to his ward, although its principal part had been invested by him. Chancellor Walworth remarked, that this *mode* of computing the commission, would be correct if the infant were then of age, and a final settlement of the account of the guardian were being had, with a view of turning over the whole to the ward. But that it was not the intention of the legislature or court to sanction the principle of allowing the guardian or trustee full commissions upon every receipt and re-investment of the trust fund committed to his care, &c. That the result of such a principle of computing allowance for commissions, if the investments were made from year to year, and the accounts rendered annually, would be to give the trustee his full commissions upon the principal of the trust fund every year, as well as upon the income received and expended from time to time. The proper rule, therefore, for computing the commissions upon the first annual statement or passing of the accounts of the guardian, receiver, committee, etc., who is required to render or pass his accounts periodically, during the continuance of the trust, is to allow him one-half of the commis-

¹ See Walworth, Chancellor, in Kellogg's Case, 7 Paige, 267; see also Livingston's Case, 9 Paige, 403, and Hosack v. Rogers, 9 Paige, 468.

sion, at the rate specified in the statutes, upon all moneys *received* by him as such trustee, other than the principal moneys received from investments made by him on account of the trust estate. And he is also to be allowed his half commission on all moneys *paid out* by him in bonds and mortgages, stocks or other proper securities for the benefit of the trust estate under his care and management, leaving the *residue* of his half commissions upon the fund which has come to his hands, and which remains invested or unexpended at the time of rendering or passing such accounts, for future adjustment, when such funds shall have been expended, or when the trustee makes a final settlement of his account upon the termination of the trust. And upon every other periodical statement of the account during the continuance of the trust, half commissions should be computed in the same manner, upon all sums received as interest or income of the estate, or as further additions to the capital thereof since the rendering or passing his last account; and half commissions upon all sums expended except as investments.¹ Double commissions are not to be allowed where an executor acts in the double capacity of executor and trustee;² and when there are several trustees, the commissions are computed upon the aggregate sums received and paid out by all of them collectively, and the commissions will be apportioned either equally or in proportion to their

¹ See preceding note.

² *Valentine v. Valentine*, 3 Barb. Ch., 438; see also *Aston's Estate*, 4 Whart., 241; *Stevenson's Estate*, Parsons' Eq. Rep., 19.

respective services;¹ and where one has done nothing, he will be entitled to no part of the commission.²

The manner in which compensation is given in Pennsylvania, is not fixed by statute, but is left more to the judgment and discretion of the court. In some cases the compensation has been by awarding a gross sum rather than a rate per cent,³ but the general practice there is by commissions, and that is usually, although not uniformly, five per cent.⁴ There are exceptions to the rule, as it would be unequal when applied to different estates. In some small ones, where the sums are collected in driblets, five per cent would be insufficient.⁵ In other cases, where the total amount is large, and sums are collected and paid away in large masses, five per cent would be too much. It is therefore left to the discretion of the courts to ascertain those cases where the general rule should be departed from.⁶ It is also a matter of discretion whether to allow commissions on re-investments or not. The amount of compensation in these cases, said Woodward, J., "must depend on the discretion, which is nothing

¹ See preceding note.

² *White v. Bullock*, 20 Barb., 99.

³ *Harland's Account*, 5 Rawle, 330; *Armstrong's Estate*, 6 Watts, 237; *McFarland's Estate*, 4 Barr, 149; *Brinton's Estate*, 10 Barr, 411.

⁴ *Pusey v. Clemson*, 9 S. & R., 209; *Pennell's Appeal*, 2 Barr, 216; *Hemphill's Estate*, Par. Eq. R., 31; *Bird's Estate*, 2 ib., 171.

⁵ *Marsteller's Appeal*, 4 Watts, 268.

⁶ Per *Tilghman, C. J.*, in *Pusey v. Clemson*, 9 S. & R., 209; see *Harland's Accounts*, 5 Rawle, 331; *McFarland's Estate*, 4 Barr, 149; *Stephenson's Estate*, 4 Whart., 104; *Walker's Estate*, 9 S. & R., 225; *Miller's Estate*, 1 Ashm., 335; see also *Heckert's Appeal*, 12 Harris, 482.

else than the *reason and conscience*, of the tribunals having jurisdiction of the trust.”¹

In Massachusetts the compensation to executors is regulated by statute, and the same rule is applied allowing commissions and at the same rates as in New York.² Prior to the introduction by statute, of the New York rule, the courts of Massachusetts compensated executors and others acting in a fiduciary capacity, by making what was deemed a “reasonable allowance;” and for the purpose of determining what was “reasonable,” they resorted to the usage among merchants, factors and others, who undertake to manage the interests and concerns of others, and fixed upon five per cent upon the gross amount of the property which had come into the hands of the trustee.³

In the case of *Dixon and Wife v. Homer et al.*,⁴ Shaw, C. J., stated the distinction between the duties of an executor and a trustee thus: “There is not much analogy between the case of a trustee and that of an executor. The great duty of an executor or administrator is to collect the assets of the estate and make distribution of the same. In doing this, he receives the money once and disburses it once; and his compensation is not fixed until he

¹ Heckert's Appeal, 12 Harris, 482; see Barton's Estate, Pars. Eq., 89; Hemphill's Appeal, 6 Harris, 303; see *Dixon and Wife v. Homer et al.*, 2 Metc., 422.

² R. S. 1835, p. 436; ante, p. 842.

³ *Barrell v. Joy*, 16 Mass., 229; *Denny v. Allen*, 1 Pick., 147; *Longley v. Hall*, 11 Pick., 124; *Ellis v. Ellis*, 12 Pick., 183; *Jenkins v. Eldridge*, 3 Story, 225; but see *Scudder v. Crocker*, 1 Cush., 382, where the court allowed less than five per cent.

⁴ *Dixon v. Homer*, 2 Metc., 422.

settles his accounts of such receipts and disbursements, as far as they have been actually made. It is then a compensation for services actually done. The case of a trustee is more analogous to that of a guardian. He takes the property to preserve, manage, invest, reinvest, and take the income of it, perhaps for a short period, and perhaps for a long course of years depending on various contingencies. It may happen that the trust will terminate in a few days by the death of the trustee, or his resignation or removal before any beneficial service is performed. Therefore, no allowance can justly be made on assuming the trust. An allowance of a reasonable commission on net income from real and personal estate—income received and accounted for—appears to be a suitable and proper mode of compensating trustees for the execution of their trusts. Whether any allowance shall be made, in addition to a reasonable commission for extra services at the determination of the trust and settlement of the account, or whenever accounts are settled during the continuance of the trust must depend on the circumstances of each particular case. When a specific compensation is fixed by the testator no other will be given, unless the executor renounce the provision made by the testator.¹

In New Jersey, it is provided by statute,² “that, on the settlement of accounts of executors, administrators, guardians and trustees under a will, their

¹ See R. S. , 1835. p. 436.

² N. J. R. S., 1855, act 17th March, 1855, sec. 9. 10; Nixon's Dig., 562.

commissions over and above their actual and necessary expenses, shall not exceed the following rates: On all sums not exceeding \$1,000, received and paid out, seven per cent.; if over \$1,000 and not exceeding \$5,000, four per cent. on such excess; if over \$5,000 and not exceeding \$10,000, three per cent. on such excess; if over \$10,000, two per cent. on such excess; and in all cases such allowances shall be made for their actual and necessary expenses as shall be reasonable and just, provided that the act shall only apply to such executors, administrators and guardians as may enter upon the discharge of their duties as such after the act should take effect, and that the ordinary expenses, commissions and fees paid out shall in no case, exceed, in the aggregate, the one-fifth part of the estate settled: and where provision shall be made by will, for a specific compensation to an executor, trustee or guardian, the same shall be deemed a full satisfaction for his services in lieu of said allowance, or his share thereof, unless he shall, by writing, filed with the surrogate, renounce all claim to such specific compensation."

In Maryland, the Orphan's Court is invested with a discretion to vary the amount of the executor's commission between five and ten per cent., on the amount of the inventory, &c., with power also to make additional allowance for costs and extraordinary expenses, not personal, &c.¹ The commissions

¹ Act of 1798; *Scott v. Dorsey*, 1 Har. & J., 232; *William v. Mosher*, 6 Gill., 454.

of trustees for the sale of real estate are regulated by special rules of court. On the first \$100, seven per cent. is charged; on the second \$100, six per cent.; on the third \$100, five per cent.; on the fourth \$100, four per cent.; on the fifth and sixth \$100, three and one-half per cent.; on the seventh and eighth, three per cent.; on the ninth and tenth, two and one-half, &c., and three per cent. on all above \$3,000, besides an allowance for expenses not personal. This allowance to be increased or diminished according to certain circumstances, in the judgment and discretion of the Chancellor.¹ The commissions of trustees generally are the same as executors.² Trustees and executors are treated with indulgence by the court, both with respect to commissions and other expenses.³ Thus they are allowed the expense of employing an attorney when necessary;⁴ and, also, allowances have been made where the trustee himself was an attorney.⁵

In the case of *Winter v. Diffenderffer*,⁶ the trus-

¹ See *Gibson's Case*, 1 Bland. Ch. Rep., 147.

² *Ringgold v. Ringgold*, 1 Harris & Gill., 27; *Nicholas v. Hodges*, 1 Pet. S. C. Rep., 565; *West v. Smith*, 8 How. U. S. Rep., 411.

³ *Green v. Putney*, 1 Md. Ch. Decis., 267; *Mitchel v. Holmes*, 1 Md. Ch. Decis., 287; *Jones v. Stockett*, 2 Bland., 417; *Diffenderffer v. Winter*, 3 Gill. & John., 347; *Compton v. Barnes*, 4 Gill., 57; *Chase v. Lockerman*, 11 Gill. & John., 185; *Dorsey v. Dorsey*, 10 Md., 471, and 6 Md., 460; *Post v. Mackall*, 3 Bland., 529; *Bank v. Martin*, 3 Md. Ch. Decis., 225.

⁴ *Green v. Putney*, 1 Md. Ch., 267; *Dorsey v. Dorsey*, 6 Md., 460, and 10 ib., 471.

⁵ *Post v. Mackall*, 3 Bland., 529; *Bank v. Martin*, 3 Md. Ch., 225.

⁶ *Winter v. Diffenderffer*, 2 Bland. Ch., 207; see *Thomas v. The Frederick Co. School*, 9 Gill. & John., 115.

tee had been charged with compound interest; nevertheless, the Chancellor gave him ten per cent. because the management of the estate had been troublesome. The Chancellor said, "The principle upon which a Court of Chancery awards simple or compound interest to a party whose money has been unjustly withheld or misapplied, is that of commutative justice, considering the interest as a full compensation for the injustice done, and as the proper or only remuneration which the court can award in such cases. Therefore, to lessen or altogether withhold from a trustee any allowance to which he may be justly entitled, upon the same ground on which he had been charged with simple or compound interest, would be, in effect, to impose on him a fine or forfeiture upon the principle of vindictive justice; and to punish him for an offence which the court itself had declared, would be sufficiently expiated by the payment of simple or compound interest.

"The duties performed by a trustee, may have been so light, or may have been performed in so negligent and unskillful a manner, as, on that ground, to entitle him to small, or no commission at all. But to whatever compensation he may be entitled, they certainly should not be lessened or altogether be withheld on the ground of his having done or omitted to do anything for which the payment of simple or compound interest had been awarded as a compensation, because every single transaction must be considered by itself. Recollecting, however, that a trustee cannot be allowed anything as compensation

until he has paid all he owes to the plaintiffs or *cestuis que trust*.”¹

If the executor or trustee acts to the advantage of the estate, in the capacity of an overseer of the same, it is competent for the Orphan's Court to make an allowance for such services. But the court will not require them to act in such a capacity, &c.² Where there has been a partial administration by an executor, the court may allow such a compensation as is deemed reasonable; but when there is a full administration he is entitled to at least five per cent.³

In Virginia, as a general rule, fiduciaries of every description are allowed a commission on receipts; which does not exceed five per cent., unless in special cases.⁴ In *Fitzgerald v. Jones*,⁵ Tucker, J., said, “I very much incline to think that where the management of an estate is thrown upon an executor, and the care and education of a family of children with it, that the executor ought to have a more liberal allowance than a bare commission of five per cent. upon his receipts and expenditures. In the present case the testator left five children, apparently minors, who remained so many years. He charged his whole estate with the payment of his

¹ See preceding note.

² *Lee v. Welsh*, 6 Gill. & John., 316; *Evans v. Inglehart*, 6 Gill. & John., 171.

³ *McPherson v. Israel*, 5 Gill. & John., 60; *Parker v. Gwynn*, 4 Md., 423; *Gwynn v. Dorsey*, 4 G. & J., 453.

⁴ *Johns v. Williams*, 2 Call., 105; *Grandberry v. Grandberry*, 1 Wash. Rep., 246.

⁵ *Fitzgerald v. Jones*, 1 Munf., 156.

daughters' legacies, if it could be effected out of the profits before either of them married or came of age. To do this the executor must do many things beyond what the duty of an executor, in ordinary cases, imposes. His personal trouble and responsibility, under such circumstances, may be increased ten fold. He ought to be compensated accordingly, whenever it appears that he has faithfully discharged the extraordinary duty imposed on him by the testator."¹ And where estates are large and troublesome, ten per cent has been allowed in full for commissions and other expenses.² Sometimes five per cent. in addition to expenses;³ sometimes five per cent. is given in lieu of all expenses.⁴ These commissions are paid, and expenses are allowed, under the provisions of the Revised Statutes, which direct the commissioners in settling the account of any fiduciary, to allow the reasonable expenses incurred by him as such, and also reasonable commissions, except in cases where it is otherwise provided, as in cases of a legacy to an executor for his compensation, or some specific sum named to be paid for his services.⁵

In Delaware it is held that a voluntary trustee is not entitled to any compensation for his time and trouble; that he is entitled to have his expenses

¹ See preceding note.

² *McCall v. Peachy's Adm'r*, 3 Munf., 306.

³ *Hipkins v. Bernard*, 4 Munf., 93; *Farneyhough's Ex'ors v. Dickerson*, 2 Rob., 589.

⁴ *Shepherd v. Starke*, 3 Munf., 29.

⁵ *Jones v. Williams*, 2 Call., 105.

paid, and to be indemnified against loss, but he is to have nothing more.¹

In North Carolina, commissions and necessary expenses are allowed to executors, etc. The allowance of a commission not exceeding five per cent. for the amount of receipts and expenditures, fairly made, is authorized by statute.² But they are not to be allowed on any larger amount of the proceeds than the sum actually applied in the payment of debts. The court cannot allow more than five per cent., although they may allow less.³

Besides these commissions, executors are allowed their actual expenses, in the faithful discharge of their duties, such as attending *necessary* sales, or sending an agent out of the State,⁴ or for the payment of counsel fees, etc.⁵ But when the executor permits the personal estate to go out of his hands, he cannot subject the real estate in the hands of the heir to a charge for his services.⁶

It has been exceeding questionable, how far these provisions in favor of executors, etc., would be extended to trustees. Ruffin, J., in the case of *Boyd v. Hawkins*,⁷ said, "We are informed that it has

¹ *Egbert v. Brooks*, 3 Harrington, 112; *Stale v. Platt & Rogers*, 4 Harrington, 154.

² R. S. 1854, ch. 46, sec. 38, p. 288.

³ *Bond v. Turner*, 2 Taylor, 125; *Peyton v. Smith*, 2 Dev. & Batt. Eq., 349; *Walton v. Avery*, 2 Dev. & Batt., 405.

⁴ *Whitled v. Webb*, 2 Dev. & Batt., 442.

⁵ *Hester v. Hester*, 3 Ired. Eq., 9; *Poindexter v. Gibbons*, 1 Jones' Eq. Rep., 44, and *Morris v. Morris*, ib., 326.

⁶ *Newsom v. Newsom*, 3 Ired. Eq., 411.

⁷ *Boyd v. Hawkins*, 2 Dev. Eq., 334; see also *Sherrill v. Shuford*, 6 Ired. Eq., 228; *Raiford v. Raiford*, 6 Ired. Eq., 495; *Ingram v. Kirkpatrick*, 8 Ired. Eq., 62.

been usual in some parts of this State for trustees to charge for services, and that the profession have no decided opinion against it. The amount will of course be according to the circumstances, and not beyond that which would, under the statutes, be made to executors; and if fixed by the parties, it will be subject to the revision of the court, and be reduced to what is fair, or altogether denied, if the stipulation for it has been coerced by the creditor as the price of indulgence, or as a cover to illegal interest, or the conduct of the trustee has been *mala fide* and injurious to the *cestui que trust*." Whether it shall be given as a commission or not, is hardly worth disputing about; that may be a convenient mode for computing in most cases, but the true object is a *just allowance for time, labor, service* and expenses, under all the circumstances that may be shown before a master.¹

In South Carolina, under the statute² allowing to executors and administrators a sum not exceeding fifty shillings for every hundred pounds they should pay away in credits, debts, legacies, or otherwise, during the continuance of their administration, it is held that such allowance covers all those expenses which are sometimes termed *personal*.³

Where an executor pays money to himself as guardian, he is allowed two and a half per cent, as executor, for transferring it, and the same commis-

¹ See preceding note.

² Act of 13th March, 1789, (5 Stat., 112).

³ *Logan v. Logan*, 1 McCord's Ch., 5.

sion as guardian for receiving it.¹ So a commission also was allowed on bonds taken for the purchase money of real estate, &c., and where the executor purchased the estate himself,² but not on the proceeds of lands sold under a decree of foreclosure, on the ground that the money was neither received or paid away by the executors.³ So where an estate was paid over to a commissioner under a decree in equity, full commissions were refused.⁴ So where a testator bequeathed to his executors ten per cent on the whole amount of moneys to be collected from the sale of the estate, and of outstanding debts due, or which might thereafter become due; it was held that the commission should be allowed on the sums actually collected by them, but not on those sums which they had failed to collect.⁵

These principles have been applied to trustees and receivers.⁶ But not to those cases where trustees have expressly agreed to act without commission.⁷ Under the act of 1789, executors were required to file their annual accounts, and if they neglected to do so, they forfeited their commissions; and a substantial compliance with this provision is always insisted upon.⁸

A similar statute exists in Georgia, which sub-

¹ *Ex parte Witherspoon*, 3 Rich Eq., 13; *Deas v. Span*, Harper's Eq. Rep., 276; *Gist v. Gist*, 2 McCord's Ch. Rep., 474.

² *Vance v. Gary*, Recc Eq., 2; see also *Griffin v. Bonham*, 9 Rich Eq., 71.

³ *Ball v. Brown*, Bail. Eq., 374.

⁴ *Thompson v. Palmer*, 3 Rich Eq., 141.

⁵ *Edmonds v. Crenshaw*, Harp., 233.

⁶ *Bona v. Davant*, Riley Ch. Ca., 44.

⁷ *McCaw v. Blunt*, 2 McCord's Eq., 90.

⁸ *Benson v. Bruce*, 4 Desau., 464.

stantially regulates the commissions of fiduciaries in that State,¹ and likewise punishes an executor with the loss of his commission, if he neglects to render his annual accounts to the register of probate.² It is held that trustees have an inherent right to be reimbursed all expenses properly incurred in the execution of their trust, and are entitled to compensation for their time and service in its management.³

In Alabama, compensation is allowed to all acting in a fiduciary capacity, and although the statute has never fixed a percentage, yet in ordinary cases, five per cent seems to be the usual allowance.⁴ But this is by no means the fixed per cent in all cases; each case is governed by its peculiar circumstances. The compensation is controlled to a great extent by the amount of the estate, and by the labor and responsibility incurred in its administration.⁵

It is held that the compensation being rather a matter of grace than of right, it will depend entirely upon the *bona fides* of the trustee.⁶ Thus, in case of wilful default,⁷ or where they refuse to account.⁸

In Mississippi, the statute allows to executors,

¹ See Prince Dig., 224; 2 Cobb Dig., 304.

² See Fall v. Simmons, 6 Geo., 274; Kenan v. Paul, 8 Georgia R., 417; see the act 22d Feb., 1850, 2 Cobb Dig., 340, giving the court discretionary power under certain circumstances.

³ Lowe v. Morris, 13 Geo., 169; see also Burney v. Spear, 17 Geo., 225

⁴ Bendell v. Bendell, 24 Alab., 306.

⁵ Gould v. Hays, 25 Alab., 432.

⁶ O'Neil v. Donnell, 9 Alab., 738.

⁷ Powell v. Powell, 10 Alab., 914; Gould v. Hays, 25 Alab., 432.

⁸ Hall v. Wilson's Heirs, 14 Alab., 295.

such compensation as shall be reasonable and just, not less than *five*, nor exceeding *ten* per cent of the amount of the appraised value on the whole estate,¹ including the real estate where its proceeds pass through their hands. But the allowance is only made on the final settlement.² And if the executor resigns his administration, it is in the discretion of the probate court to make a proper allowance.³ This allowance at the discretion of the court from five to ten per cent, is intended to cover all their compensation and other expenses.⁴

In Tennessee, executors, administrators and guardians have a reasonable compensation for their services as such,⁵ and are reimbursed all their necessary expenses. So also in Kentucky, latterly, the courts have allowed trustees a compensation.⁶ In Illinois, executors, &c., are allowed as compensation for their trouble, six per cent on the whole amount of personal estate, and not exceeding three per cent on money arising from the sale or letting of land, &c.;⁷ and thus in respect to other of the States. The principle of allowing compensation to fiduciaries for their time and trouble in the management of their trusts, is generally recognized as just, and

¹ Hutch. & How., Dig., 414, sec. 96; Merrill a. Moor, 7 How., 292; Cherry v. Jarratt, 3 Cush., 221.

² Shurtleff v. Witherspoon, 1 Sm. & M., 622.

³ Cherry v. Jarratt, 3 Cush., 221.

⁴ See Satterwhite v. Littlefield, 13 Sm. & M., 306; Shirley v. Shattuck, 6 Cush., 26.

⁵ Act 27th Jan., 1838.

⁶ Lane v. Coleman, 8 B. Monr., 571; Greening v. Fox, 12 B. Monr., 190.

⁷ Act 3d March, 1845, sec. 36, 2 R. S., 1219.

one that will soon become universal. It is a universal practice to reimburse trustees and others acting in a fiduciary character, all their necessary expenses incurred in a faithful administration of the trust estate.

CHAPTER IX.

OF THE TERMINATION OF THE OFFICE
OF TRUSTEE.

After the office of trustee has been created, and its duties and liabilities have attached to the person of the trustee, he cannot, by his own act, put an end thereto, but must continue liable until legally discharged. There are several methods by which this discharge may be effected.

1. By the full expiration of the term of his office, or by a full performance of all the trusts and a conveyance and transfer of all the trust property to the *cestuis que trust*. In this case if the *cestuis que trust* are all *sui juris*, such settlement with, and transfer to them, will be a full discharge of the trustee from the duties and liabilities of his office.¹ So, also, an authorized purchase by the trustee of the *cestuis que trust* is held to be a merger of the equitable estate.² Or where the legal and equitable estates become vested in the same person the equitable estate will become merged, because one cannot

¹ *Holford v. Phipps*, 3 Beav., 434; *Goodson v. Ellison*, 3 Russ., 593; *Taverner v. Robinson*, 2 Rob. Va., 280.

² *Johnson v. Johnson*, 5 Alab., 90; *Wade v. Paget*, 1 Bro. C. C., 364.

be trustee for himself.¹ But whether an equitable estate shall thus become merged, is a question of intention, and will not be allowed in equity against the intention of the parties.²

Aside from any conveyance of the trustee to the *cestui que trust*, or to any other person under his direction, a reconveyance and surrender in certain cases, after a sufficient lapse of time, will be presumed in aid of the title, especially in cases where the mere dry legal estate has remained unnoticed in the trustee.³ The three requisites necessary to raise the presumption of reconveyance by a trustee are, 1. It must have been his duty to convey; 2. There must be sufficient reason to presume he did convey; and, 3. The object of the presumption must be to support a just title.⁴

2. The office of trustee may be determined by

¹ *Cooper v. Cooper*, 1 Halst. Ch., 9; *Mason v. Mason*, 2 Sanlf. Ch., 433; *James v. Morey*, 2 Cowen, 246; *James v. Johnson*, 6 Johns. Ch. R., 417; *Healy v. Alston*, 25 Miss., 190; see also *Wade v. Paget*, 1 Bro. C. C., 364; *Lewis v. Starke*, 10 Sm. & M., 128; *Brown v. Bartee*, 10 Sm. & M., 268.

² *Gardner v. Astor*, 3 Johns. Ch. R., 53; *Starr v. Ellis*, 6 Johns. Ch. R., 393; *Den v. Van Ness*, 5 Halst., (N. J.), 102; see also *how* equity will protect the rights of the *cestui que trust*, *Nurse v. Yerworth*, 3 Sw., 608; *Thom v. Newman*, 3 Sw., 603; 1 Cruise Dig., tit. 8, ch. 2, sec. 47, 50; also 6 Cruise Dig., tit. 39, sec. 72, 113.

³ *Hillary v. Waller*, 12 Ves., 239; *Noel v. Bewley*, 3 Sim., 103; *Goodtitle v. Jones*, 7 Term. Rep., 47; *Emery v. Grocock*, 6 Madd., 54; *Jackson v. Price*, 2 Johns., 226; *Sinclair v. Jackson*, 8 Cowen, 543; *Moore v. Jackson*, 4 Wend., 59; *Dutch Church v. Mott*, 7 Paige, 77; *Aikin v. Smith*, 1 Sneed, 304; *Matthews v. Ward*, 10 Gill. & John., 443; see *Moore v. Jackson*, 13 Johns. Rep., 513.

⁴ *Hill on Trustees*, 253. As to duty of the trustee, see *Beach v. Beach*, 14 Vt., 28; see also *Langley v. Sneyd*, 1 S. & St., 45; *Goodson v. Ellison*, 3 Russ., 583; *Noel v. Bewley*, 3 Sim., 103; *Hillary v. Waller*, 12 Ves., 239, 252; *Wilson v. Allen*, 1 J. & W., 611, 620; see also *Aikin v. Smith*, 1 Sneed, 304.

the resignation of the trustee and the acceptance of it by the court; or by the discharge of the trustee, and the appointment of another in his place, under a power contained in the trust instrument; or by the authority of the court, either acting according to the rules of equity, or under the special authority of statutory enactments. But this termination of the office, does not necessarily discharge the trustee from liability for past conduct in the management of the trust.¹

3. So, also, a trustee may be discharged from his office as such, with the concurrence of *all the cestuis que trust*, whether there be a new trustee appointed in his place or not. It is hardly necessary to remark that the *cestuis que trust* must all be competent to bind themselves by their contract; and, consequently, this method of discharge cannot be resorted to when any of the *cestuis que trust* are not *in esse*, or not *sui juris*.²

4. And the death of one of several co-trustees will also terminate the office of trustee in respect to such trustee, his heirs and personal representatives; because, being joint tenants, the trust estate, on the death of a co-trustee, vests in the survivors or survivor.

But the discharge of the trustee from his office, upon the determination of the trusts, or the appointment of another to succeed him, is not, of itself, an

¹ Hill on Trustees, 580.

² *Overton v. Bannister*, 3 Hare, 503; see also as to settlements immediately after infants have come of age, *Walker v. Symonds*, 2 Sw., 69; also *Weddeburn v. Weddeburn*, 4 M. & Cr., 50.

extinguishment of his liability for past misconduct as trustee, or of the right of the *cestui que trust*, to examine into the same. Nor can the trustee, on transferring the trust property, insist upon any such discharge as the condition upon which he will make such conveyance.¹ Where the trustee has reason to doubt the safety of paying over or conveying to the *cestuis que trust*, as, where their title is not perfectly clear, and there is a possibility of future questions arising as to the propriety of such conveyance or transfer, he may insist upon having the court settle the doubtful questions, unless the *cestuis que trust* will give him the proper indemnity.²

If the trustees wish to obtain a release which will be conclusive and binding upon the *cestuis que trust*, they should make a full statement of their accounts and other transactions, with all the explanations and information necessary to a full understanding of their rights.³ For should there be any concealment, or withholding of information or other fraudulent conduct on the part of the trustee, the release would be vitiated.⁴ And if there have been any transactions which would be deemed a breach of trust, it would be well to state them distinctly, in the instrument of release, with

¹ *Fulton v. Gilmour*, 8 Beav., 154; see *Chadwick v. Heatley*, 2 Coll. C. C., 137; *Hill on Trustees*, 580.

² See *Goodson v. Ellison*, 3 Russ., 583.

³ See *Wedderburn v. Wedderburn*, 2 Keen, 722, and 4 M. & Cr., 41, 50, and *Charter v. Trevelyan*, 1 H. & L. Cas., 714.

⁴ *Walker v. Symonds*, 3 Sw., 73; also *Wedderburn v. Wedderburn*, 4 M. & Cr., 41.

all the material facts connected therewith.¹ Not only should all these circumstances be noticed and fully explained at the time of obtaining the release of the *cestuis que trust*, but there should be sufficient time for deliberation and investigation on their part, especially where the *cestuis que trust* have been infants, and but recently come of age."²

But where the trust has been one of a complicated character, and has extended over a long period of years, it is extremely difficult so to frame a release and discharge of the trustees by the *cestuis que trust* as to make it reliable as an absolute protection against future claims. The most effectual method, in such cases, and perhaps the only sure one, is by a decree of a Court of Equity. Where the trustee has submitted his accounts to the Master, and they have been duly passed, and a decree has been duly obtained in a suit where all the *cestuis que trust* are parties discharging the trustee, he will be safe from any future claim for his conduct in the trust.³

¹ See preceding note, and Hill on Trustees, 525.

² Walker v. Symonds, 3 Sw., 73; and see also *Re Sherwood*, 3 Beav., 338; *Portlock v. Gardner*, 1 Hare, 594, as to the effect of a release of the *cestui que trust*.

³ *Knatchbull v. Fearnhead*, 3 M. & Cr., 122; *Low v. Carter*, 1 Beav., 426; see *Moore's Appeal*, 10 Barr, 435.

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